16. Moving human rights jurisprudence to a higher gear: rewriting the case of the Kichwa Indigenous People of Sarayaku v Ecuador (IACtHR)

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I. INTRODUCTION

The Kichwa Indigenous People of Sarayaku (the Sarayaku People) are an indigenous community in the central Amazon in Ecuador that successfully opposed the continued implementation of an oil concession agreement between their government and an Argentinian oil company, Compañía General de Combustibles SA (CGC).[1] The story of the Sarayaku people is characteristic of the challenges posed by economic globalization, as investors increasingly enter into remote areas to execute projects that intrude upon the lives of the communities inhabiting these regions.

Notwithstanding its successful outcome, the story is not all rosy. Tensions regularly escalated and violence was never far away. The Sarayaku People had to fight to maintain unity, as some members preferred to join forces with CGC, which successfully concluded agreements with other indigenous communities in the central Amazon.

Two years after the formal suspension of the oil concession, the Sarayaku people also enjoyed a court victory, as the Inter-American Court of Human Rights (the Inter-American Court or the Court) held that the State of Ecuador had violated their rights as an indigenous

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[1] CGC is an Argentinian oil and gas company, which also operates in Venezuela, and formed a consortium with Petrolera Argentina San Jorge S.A. for the Ecuadorian oil concession.

community.[2] Notwithstanding some remarkable features, the judgment could be improved in several respects by further integrating international human rights law, domestic best practices on fundamental rights and international environmental law.

II. *THE KICHWA INDIGENOUS PEOPLE OF SARAYAKU V ECUADOR*

A. Relevant Facts and Arguments

The Sarayaku community comprises of around 1,200 people, who live along the banks of the Bobonaza River in the central Amazon, an area of astonishing biological diversity. Their territorial rights have been recognized by the State of Ecuador since 1992. Nevertheless, when in 1996 the government signed an oil concession agreement with CGC that covered the Sarayaku traditional territory, the community was not consulted.

When CGC approached the Sarayaku People in order to gain peaceful access to their territory, they refused. The oil company nonetheless entered the Sarayaku territory and started carrying out its exploration activities, which included the opening of seismic lines and the installation of large amounts of 'pentolite' explosives on the surface and in the subsoil. Moreover, the company established heliports, cut down valuable trees and plants, destroyed water sources and destroyed sites of great importance to the culture and worldview of the Sarayaku People. At times, the state guaranteed the security of the exploration activities with armed forces.

Because of the continued opposition by the Sarayaku People, the Ecuadorian government eventually suspended the oil concession in 2010, two years before the Inter-American Court delivered its judgment. Again without involving the Sarayaku People, the government and CGC agreed in a Deed of Termination that no environmental liability could be attributed to the contractor.

In its submissions to the Court, the Inter-American Commission on Human Rights (the Inter-American Commission or the Commission) alleged that the State of Ecuador had violated the Sarayaku People's right to property (article 21 American Convention on Human Rights (ACHR)), in relation to the obligations to respect rights and to adopt domestic legal

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[2] *The Kichwa Indigenous People of Sarayaku v Ecuador* (2012) IACtHR C 245.

provisions and the rights to access to information, to freedom of movement and residence and to prior consultation (articles 1(1), 2, 13, 22 and 23 ACHR). In addition, the Commission alleged a violation of the rights to life, to personal integrity and to personal liberty (articles 4, 5 and 7 ACHR) and to judicial guarantees and judicial protection (article 25 ACHR). The Sarayaku People endorsed the Commission's application, but also invoked article 26 ACHR as a basis for their right to cultural identity. Furthermore, according to the Sarayaku People, they should not merely have been consulted, but their free, prior and informed consent (FPIC) should have been obtained (paras 127 and 287).

B. Summary of the Judgment

Three remarkable aspects of the *Sarayaku* judgment should be highlighted at the outset. First, at an early stage of the proceedings, the (new) Ecuadorian government acknowledged its international legal responsibility (para 23) and admitted its failure to carry out a proper consultation (para 189). Second, for the first time in the Court's history a delegation of judges, accompanied by the Commission, state delegates and representatives of the presumed victims, undertook a field visit to the Sarayaku territory and the neighbouring village of Jatún Molino. Third, the Court held that its legal considerations should be understood from a collective perspective, relating to 'the Sarayaku People' as such. This contrasts with previous jurisprudence that has only established violations of the rights of *members* of indigenous communities (para 231).

The Court began its judgment by reiterating its established principles on the protection of communal land and natural resources under article 21 ACHR in relation to indigenous and tribal peoples (para 146). In particular, the Court stressed that 'one of the fundamental guarantees to ensure the participation of indigenous peoples . . . in their right to communal property, is . . . the recognition of their right to consultation' (para 160), and that such consultation must meet certain quality standards (paras 177–178).While their communal ownership rights as such were not contested, the State of Ecuador had not consulted the Sarayaku People, who had only been approached by CGC. The obligation to consult is, however, a responsibility of the state that cannot be delegated (para 187). Moreover, the contacts between CGC and the Sarayaku People did not satisfy the Court's criteria of consultation, as was strikingly illustrated by the non-contested allegation that CGC had used fraudulent means to obtain signatures from individual community members without respecting established structures of authority and representation (para 194). In addition, the damage caused to areas of environmental, cultural and

subsistence food value evidenced 'a lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life . . .' (para 220). The Court, therefore, concluded that the State of Ecuador had also violated the Sarayaku People's right to cultural identity, which is a crosscutting means of interpretation of the ACHR in light of the non-discrimination principle of article 1(1) (para 213).

The Court also found that the state had seriously jeopardized the rights to life and to personal integrity (para 249), because notwithstanding the great risks posed to the life and physical integrity of the Sarayaku People, the State had allowed CGC to place explosives in their territory, and had only partially complied with the Court's order in the provisional measures to remove the explosive material.[3] Finally, since the authorities had not adequately investigated the reported facts nor provided for an effective remedy to contest the oil concession, the rights to judicial guarantees and judicial protection had not been safeguarded either (paras 271 and 278). As to the allegations related to freedom of movement and residence, political rights, freedom of thought and expression, and economic, social and cultural rights, on the other hand, the Court held that the facts underlying those complaints had been sufficiently examined in the context of its analysis under the rights to communal property, consultation, life and personal integrity and/or cultural rights (paras 229–230).

In line with its established jurisprudence, the Court ended its judgment with the adoption of an extensive list of reparations, including restitution (the removal of explosives and reforestation of the affected areas), guarantees of non-repetition (due prior consultation, regulation of such process in domestic law and training of officials on indigenous peoples' rights), satisfaction (public acknowledgment of international responsibility and publication and broadcasting of the judgment) and compensation for both pecuniary and non-pecuniary damage.

C. Integrating Human Rights

Article 29(b) and (d) ACHR brings the Inter-American Court into pole position to adopt an integrative approach to human rights law.[4] The

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[3] See for example Order of the Court of 4 February 2010, on Provisional Measures regarding the Republic of Ecuador in the Matter of the Kichwa Indigenous People of Sarayaku.

[4] Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

a. . . .

b. restricting the enjoyment or exercise of any right or freedom recognized by

Court itself has interpreted these provisions as mandating the importation of international and regional human rights standards, including soft law.[5]

> The nature of the subject matter itself . . . militates against a strict distinction between universalism and regionalism. Mankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems. In this context, it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards.[6]

This attitude is not limited to human rights law *per se*. Lixinski has convincingly argued that the Inter-American Court's expansionism and activism have ensured that human rights constitute an overall part of the general international legal system.[7] Indeed, at various points throughout the *Sarayaku* judgment, the Court draws on evolving international law and on domestic legal changes, for instance as regards consultation (e.g. paras 161–164) and the recognition of indigenous peoples as collective subjects of international law (para 231).

Nevertheless, this chapter argues that a more sustained integrative perspective would improve the *Sarayaku* judgment. First of all, indigenous peoples' right to self-determination should feature at the forefront of the Court's analysis.[8] Second, the Court should further develop the FPIC

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virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. . . .
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

[5] For example *Moiwana Community v Suriname* (2005) IACtHR C 124. For a discussion of the Court's interpretative approach, see Gerald L Neuman, 'Import, export, and regional consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101.

[6] *'Other treaties' subject to the consultative jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)* (1982) IACtHR Advisory Opinion OC-1/82 A 1, para 40. Accord *Las Palmeras v Colombia* (2000) IACtHR C 67.

[7] Lucas Lixinski, 'Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law' (2010) 21 EJIL 585–604.

[8] For the purposes of this chapter it suffices to note that the right to self-determination does not include a right to secede. Political self-determination covers self-government or autonomy at the local level and effective participation at the higher levels of politics. See for example CERD, *General Recommendation 21: The right to self-determination* (UN Doc A/51/18 (1996)); James Anaya, 'The evolution of the concept of indigenous peoples and its contemporary dimensions'

norm, in line with its earlier jurisprudence. Third, the analysis of some possible human rights violations was in this matter unjustifiably absorbed into the Court's reasoning under article 21 ACHR. Fourth, children's rights could be more explicitly mainstreamed. Fifth, the right to live in a healthy environment should be included in the right to life. Sixth, the Court should explicitly acknowledge that non-state actors bear human rights obligations. Finally, the question arises whether the Court should not consider adopting an integrative approach not only to human rights norms, but to human rights *holders* as well.

III. FEATURING INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION

In line with its established jurisprudence since the Awas Tingni case of 2001,[9] the Inter-American Court holds in the *Sarayaku* case that 'Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these' (para 145).[10] Under the Court's construction, article 21 protects not only indigenous lands and the natural resources pertaining to these lands,[11] but also other indigenous rights, such as the rights to cultural identity and to freely determine and enjoy social, cultural and economic development.[12]

Nonetheless, land rights are only part of the story. According to Anaya, indigenous peoples' quest for recognition finds expression in five claims: (1) non-discrimination, (2) cultural integrity, (3) lands and resources, (4)

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in S A Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP 2010) 41.

[9] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACtHR C 79, paras 148–149.

[10] Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. . . .

[11] *Saramaka People v Suriname* (2007) IACtHR C 172, para 95.

[12] ibid, para 122.

social welfare and development, and (5) self-government.[13] Each of these claims is grounded in one key principle: self-determination.[14] The idea of self-determination is at the heart of what unifies indigenous peoples. Regardless of the way in which tensions emerge – forced resettlements, environmental degradation, exclusion from benefits from economic growth or discriminatory policies – the fundamental right of which indigenous peoples are deprived is their right to decide for themselves and to choose their own development path.

While most, but definitely the first, cases reaching the Inter-American Court's docket revolve(d) around land claims,[15] many complaints brought by indigenous communities over the years related to land rights but in essence also dealt with cultural identity, non-discrimination, development and autonomous decision-making.[16] The Court nevertheless persists in handling such cases under the right to property – likewise in the *Sarayaku* case albeit in conjunction with the non-discrimination principle of article 1(1) ACHR. Whilst it is true that neither the Commission nor the Sarayaku representatives invoked a separate violation of, for instance, their political rights, the principle of *jura novit curia* allows the Court to raise a relevant legal issue that was overlooked by the petitioners, the Commission and the state, for instance when the Court wants to extend its jurisprudence.[17]

According to the Court, the Sarayaku People show a special relationship with their surroundings, which must be protected under article 21 ACHR 'to ensure that they can continue *their traditional way of living* . . .' (para 146).[18] Although the Court concedes that this special relationship can be expressed in different ways and has to be possible, a holding like the one quoted may (unintentionally) create the impression that indigenous communities (should) always maintain a harmonious relationship with their lands and natural resources, precisely because their way of interacting with the natural environment constitutes an inherent part of

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[13] James Anaya, *Indigenous peoples in international law* (2nd edn, Oxford University Press 2004) 129.

[14] ibid, 129.

[15] See also Thomas M Antkowiak, 'Rights, resources, and rhetoric: Indigenous peoples and the Inter-American Court' (2013–2014) 35 UPJIL 137.

[16] James Anaya, 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22 AJICL 7.

[17] Dinah Shelton, 'Jura novit curia in international human rights tribunals' in Nerina Boschiero et al. (eds), *International Courts and the Development of International Law* (Springer 2012) 210; *Sawhoyamaxa Indigenous Community v Paraguay* (2006) IACtHR C 146, para 187.

[18] Emphasis added.

their culture.[19] It may not be, however, that indigenous communities who oppose a project because they disagree with its conditions or because they want to undertake those activities themselves, no longer enjoy protection from the indigenous rights regime.[20] The same applies to communities who have agreed to a project but are subsequently confronted with violations of their rights.

Therefore, in the rewritten judgment all references to indigenous communities' ability to continue their 'traditional way of living' are replaced by the safeguard that they can 'choose their own development path', whichever one that is (for example, para 146).[21] True, there is no obvious provision in the ACHR in which to ground a right to self-determination of indigenous peoples. In the *Saramaka* judgment of 2006, however, the Inter-American Court relied on Common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (the right to self-determination) and on article 27 ICCPR (the minority rights provision[22]) to interpret indigenous peoples' land rights, and to conclude that indigenous peoples have a right to freely determine and enjoy their own social, cultural and economic development.[23] The Court should have reiterated and further developed this integrative perspective.[24] Not only indigenous peoples' right to communal ownership (article 21 ACHR), but also their rights to cultural

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[19] See also Antkowiak (n 15) 160–1; Eric Dannenmaier, 'Beyond indigenous property rights: Exploring the emergence of a distinctive connection doctrine' (2008–2009) 86 WULR 53, 109; Cherie Metcalf, 'Indigenous rights and the environment: Evolving international law' (2003–2004) 35 OLR 101, 105–6, 108 and 124.

[20] See, for instance, the Human Rights Committee's holding in *Länsman v Finland* that the fact 'that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant'. *Ilmari Länsman et al. v Finland* (1994) HRC511/1992, UN Doc CCPR/C/52/D/511/1992, para 9.3; See also Antkowiak (n 15) 161; Robert H jr. Keller and Michael F Turek, *American Indians and National Parks* (University of Arizona Press 1999) 239.

[21] This does not amount to a right to engage in environmentally destructive activities, however. For a discussion, see for example Ellen Desmet, *Indigenous Rights Entwined with Nature Conservation* (Intersentia 2011) 207–8.

[22] This provision has been interpreted by the Human Rights Committee as ensuring that minorities have a right to enjoy their own culture, which may consist in a way of life that is closely associated with territory and use of its resources. HRC, 'General Comment No 23: The right of minorities (Art. 27)' (UN Doc CCPR/C/21/Rev.1/add.5 (1994)), para 3.2, Accord *Saramaka v Suriname* (n 11), para 94.

[23] ibid, paras 93–95.

[24] see also Antkowiak (n 15) 157.

identity (article 26 ACHR), to equality (articles 1 and 24 ACHR), to social welfare and development (article 26 ACHR[25]) and to political participation (article 23 ACHR) should be interpreted and applied in light of the right to self-determination, so that they effectively enjoy the right to choose their own development path.

In addition to referring to Common article 1 ICCPR and ICESCR, the Inter-American Court should integrate article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which explicitly vests a right to self-determination in 'indigenous peoples'. The fact that the UNDRIP does not have the status of binding international law is not an obstacle, because the Court has not shied away from referring to soft law before.[26] Accordingly, the rewritten judgment consistently applies Common article 1 ICCPR and ICESCR and article 3 UNDRIP to interpret the Sarayaku People's rights to communal property, to cultural identity and to political participation (see for example, para 160).

IV. DEVELOPING THE FPIC NORM

The right to property is not absolute, nor are the rights of indigenous peoples. When scrutinizing the legitimacy of restrictions on indigenous peoples' property rights, the Inter-American Court applies a two-stage analysis – ditto in the *Sarayaku* case (para 156). First, restrictions have to be established by law, necessary, proportionate and aimed at achieving a legitimate objective in a democratic society. Second, in cases concerning natural resources on indigenous territory, the physical and cultural survival of indigenous peoples may not be denied. Avoiding the negation of their survival was interpreted in the *Saramaka* case of 2006 as imposing three duties on states: to consult (with a view to achieving an agreement), to conduct environmental impact assessments and to ensure that the peoples affected reasonably share in the benefits.[27]

These duties do not do the trick, because there is no guarantee that the views of the consulted indigenous peoples will be adequately addressed.[28] Furthermore, the benefits granted, definitely when purely

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[25] If need be, article 26 ACHR can be read in conjunction with the right to property as the Inter-American Court did in earlier jurisprudence on second generation rights. Lixinski (n 7) 600–2.

[26] For example *Moiwana v Suriname* (n 5); see also Neuman (n 6).

[27] *Saramaka v Suriname* (n 11), para 129; Antkowiak (n 15) 170–1.

[28] See also Dannenmaier (n 19) 96. There is also a risk that the interests of indigenous communities are succumbed by the dominant majority and its (even

financial, may not be capable of compensating for any losses in terms of tradition, culture, religion and spiritual beliefs. Indigenous peoples may very well resist a project because they are fundamentally opposed to large-scale, capital-intensive, ecologically intrusive and export-oriented projects.[29] Accordingly, consultation and benefit-sharing do not ensure that indigenous peoples can decide on their own development path. The silver lining in the *Saramaka* judgment, however, was the Court's holding that the duty to consult amounts to a duty to obtain the FPIC of indigenous communities for 'large-scale development or investment projects that would have a major impact' within indigenous territories.[30] Obviously, indigenous peoples' right to self-determination is respected in the case of FPIC.

In the *Sarayaku* judgment the Court seems to cast doubt on whether the FPIC requirement still stands. Not only did the Court not reiterate this standard – notwithstanding the argumentation by the Sarayaku representatives (paras 127 and 287) – but the judgment merely speaks of 'an appropriate and participatory process that guarantees the right to consultation, *particularly with regard to development or large-scale investment plans*' (para 157).[31] Neither did the Inter-American Commission argue that FPIC was required. The question is thus whether the *Sarayaku* case was so straightforward since the community had not even been consulted, or whether the case bears witness to a reluctance to accept that indigenous communities can veto projects that are approved by an elected government.

Instead of deviating from the *Saramaka* judgment, the Inter-American Court should have at least confirmed, and at best further developed, its FPIC requirement. In particular, corrections and clarifications are welcome in four regards. First of all, given the vague meaning of 'major impact', the level of protection will ultimately depend upon the body competent to decide whether consent is required for a particular project. Although the Court should be careful to adopt an abstract and thus

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democratic) decision-making, although indigenous communities are not always a minority. Kealeboga N Bojosi, 'Towards an effective right of indigenous minorities to political participation' in S A Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP 2010) 288.

[29] see also César A Rodríguez-Garavito and Luis C Arenas, 'Indigenous rights, transnational activism, and legal mobilization: The struggle of the U'wa Peoplemobilization' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below* (Cambridge University Press 2005) 246.

[30] *Saramaka v Suriname* (n 11), para 134.

[31] Emphasis added.

limiting definition, more guidance for states on the meaning of 'major impact' would be useful. For instance, consent is required for relocations according to article 16 of ILO Convention 169 and article 10 UNDRIP, and for the storage or disposal of hazardous substances within indigenous territories (article 29(2) UNDRIP).

Additional guidance can be found in the reports of the UN Special Rapporteurs on Indigenous Peoples. For instance, Rodolfo Stavenhagen wrote in 2003 that major development projects include the building or improvement of physical infrastructure, the large-scale exploitation of natural resources and the building of urban centres, tourist developments and military bases.[32] In 2013 James Anaya held that as a general rule extractive projects in indigenous territories require FPIC.[33] Also the Committee on Economic, Social and Cultural Rights (CESCR) was concerned about the state's 'failure to undertake consultations as a basis for obtaining the prior, freely given and informed consent of indigenous peoples . . . for *natural resource development projects* that affect them' in its concluding observations on Ecuador.[34] Finally, in *Poma v Peru*[35] the Human Rights Committee (HRC) held that 'measures which substantially compromise or interfere with the culturally significant economic activities of . . . [an] indigenous community' are only admissible on two conditions, one of which being that the community members have had the opportunity to effectively participate in the decision-making process, which 'requires not mere consultation but free, prior and informed consent'.[36]

Second, another matter capable for improvement in the Court's FPIC requirement relates to the criterion of 'large-scale' projects. Although scale is a relevant criterion to assess a project's impact, it is not conclusive. Even 'small' projects may have such an impact upon indigenous peoples that they should only proceed with their consent. For instance, the *Poma v Peru* decision related to the diversion of the course of a river in the 1950s, followed by the drilling of 12 wells in the 1970s, as a result of

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[32] UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, *Human rights and indigenous issues* (UN Doc E/CN.4/2003/90 (2003)).

[33] UN Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples* (UN Doc A/HRC/24/41 (2013)).

[34] Emphasis added. CESCR, *Concluding observations on the third periodic report of Ecuador* (UN Doc E/C.12/ECU/CO/3 (2012)). See also CERD, *Concluding observations on the combined 17th to 19th periodic reports of Ecuador* (UN Doc CERD/C/ECU/CO/19).

[35] *Ángela Poma Poma v Peru* (2009) HRC 1457/2006 (UN Doc CCPR/C/95/D/1457/2006).

[36] ibid, para 7.6.

which downstream wetlands gradually dried out. Third, FPIC should not be limited to 'development or investment' projects, as projects aimed at protecting biodiversity, for instance, may also considerably impair indigenous rights.[37]

And, fourth, FPIC should not only apply when communal property rights are affected. Rather, indigenous peoples' consent should be obtained whenever a decision affects their right to self-determination, whether it impairs their land rights, their cultural identity, their right to non-discrimination, their right to political participation or their right to social welfare and development. Therefore, states should not only conduct an environmental impact assessment, but a broader human rights impact assessment in order to assess the impact of a particular project on indigenous rights and to decide whether consultation suffices or consent has to be obtained (see para 157).[38] Support for the need for such human rights impact assessment is found in the UN Guiding Principles on Business and Human Rights (also below), which in Principles 17 to 21 encourage business enterprises to carry out human rights due diligence and impact assessments.[39] Also the European Court of Human Rights (ECtHR) has demanded environmental and human rights impact assessments for 'governmental decision-making process[es] concerning complex issues of environmental and economic policy'.[40]

The rewritten judgment is changed at various places (for example, para 165*bis*) to give due account to the FPIC norm in line with earlier jurisprudence. Furthermore, in order to guide states in deciding when FPIC is required, the following 'improved' guidelines are added (para 165*quater*):

> The degree of impact must be assessed in light of the results of the human rights impact assessment. Such an assessment determines the current human rights situation, predicts the potential impacts, both positive and negative, of the envisaged project on the human rights of the people concerned – in particular their ability to continue to foresee in their subsistence – assesses the probability

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[37] Desmet (n 21) 66–9.

[38] See generally for example Tarek F Maassaranit and others, 'Extracting corporate responsibility: Towards a human rights impact assessment' (2007) 40 CILJ 135–69; Gauthier De Beco, 'Human rights impact assessments' (2009) 27 NQHR 139–66.

[39] UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN Doc A/HRC/17/31 (2011)).

[40] *Giacomelli v Italy* (2006) ECHR 59909/00, para 83.

> that such effects will occur, identifies measures to mitigate or prevent negative effects and to maximize positive effects, and proposes possible alternatives.

The question remains, however, *who* should consent, since there may be disagreement within the community. As far as consultation is concerned, the Inter-American Court refers to the 'traditional decision-making practices of the people or community' (para 177). Nevertheless, the legitimacy of such consent is debatable if all decision-making power is centralized in one authority. And, in any case, accountability within the indigenous community for such decision-making processes should be ensured.

V. COMPREHENSIVELY SCRUTINIZING POTENTIAL HUMAN RIGHTS VIOLATIONS

A fundamental characteristic of human rights is their interdependence. Hence, human rights bodies regularly face cases that raise several, closely related human rights concerns. Such cases can be addressed in two ways.[41] First, given the specific circumstances at hand, one right can be considered inherent to the other. This implies that no separate analysis is necessary to highlight the specific issues raised by the former right, as these are incorporated in, or absorbed by, the reasoning under the 'dominant' right. An example can be found in the *Operation Genesis* case,[42] where the Court did not rule on the applicants' complaint regarding their right to have their honour respected, as the facts were sufficiently analysed, and the violations conceptualized, under, *inter alia*, the right to personal integrity. Second, the human rights at stake can be considered as distinct but mutually reinforcing, so that each potential rights violation should be scrutinized separately, while taking account of the aggravating circumstances of the other rights being violated as well. For instance, in *Valle Jaramillo v Colombia*,[43] the Court held that the state's inability to

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[41] Loretta Feris, 'Constitutional environmental rights: An under-utilised resource' (2008) 24 SAJHR 29, 45–8. A third situation may arise when the finding of a violation requires the joint reading of two rights, whereby one right is used to interpret and determine the scope of the other right. This is a somewhat different situation of interdependence, and not further considered for the purposes of this chapter.

[42] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013) IACtHR C 270), para 338.

[43] *Valle Jaramillo et al. v Colombia* (2008) IACtHR C 192, para 139.

protect human rights defenders, resulting in the killing of one defender and the mistreatment and holding hostage of another, did not only violate the latter person's right to human treatment but also his right to freedom of movement and residence.

In the *Sarayaku* judgment, the Inter-American Court conducted a separate, albeit succinct, analysis of the Sarayaku representatives' complaint under their right to cultural identity. Deplorably, however, article 26 ACHR does not feature in this analysis and the Court's finding of a violation is based on the non-discrimination principle of article 1(1) ACHR (para 213).[44] Meanwhile, the Court opted for the absorption approach as regards the Sarayaku People's right to freedom of movement and residence,[45] their right to freedom of thought and expression, their political rights and their economic, social and cultural rights. In particular, the Court held that the facts had been sufficiently analysed, and the violations conceptualized, under its assessment of the right to property (paras 229–230). However, this approach is only justified in cases where the dominant right constitutes the basis of the plaintiffs' claims. The absorption approach was, for instance, justifiably applied to the restrictions on freedom of movement and residence (article 22 ACHR). The Court acknowledged that the presence of pentolite explosives unlawfully restricted the Sarayaku People's movement, hunting and other traditional activities – as regards the other acts there was insufficient evidence (paras 228–29). Nevertheless, since this restriction was mainly due to the risks posed to their life and physical integrity, the Court decided that the infringements had been sufficiently examined among others under the (prevailing) rights to life and to communal property.

On the other hand, the dominant right underpinning the Sarayaku People's complaints concerning their right to property, their right to cultural identity and their political rights is the right to self-determination. The right to property being but one of the five dimensions of self-determination (*supra*), should not absorb complaints dealing with cultural and political rights. Accordingly, the rewritten judgment explicitly qualifies the interferences with the Sarayaku People's cultural and political

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[44] This provision merely requires the progressive development of the economic, social, educational, scientific and cultural standards set out in the Charter of the Organization of American States. Nevertheless, in the past the Court has used this provision in cases dealing with economic, social and cultural rights, in conjunction with the right to property, to scrutinize state conduct. Lixinski, (n 7), 600–2.

[45] Notwithstanding its express finding of unlawful restriction on movement (para 229).

rights as violations of articles 26 and 23 ACHR respectively (see for example para 230*bis* and further). The Court should also interpret these rights in light of indigenous peoples' right to self-determination under Common article 1 ICCPR and ICESCR and article 3 UNDRIP (above), and thereby recognize their right to choose their own development path. This would adequately account for the interdependence between the right to self-determination and its five constituting dimensions.

Support for a separate analysis of the different allegations by indigenous communities can be found in the *Endorois* case.[46] There, the African Commission on Human and Peoples' Rights did not end its analysis after finding a violation of the right to property but scrutinized the state's conduct in light of all potential human rights violations. This bolstered its overall reasoning, *inter alia*, as regards cultural rights (para 249) and the right to development (para 283).

A separate analysis of the various alleged human rights violations not only does justice to the claims of the petitioners as they see them and contributes to the development of the human rights regime, but could also impact the relief granted, which would accord with the Court's progressive jurisprudence on reparations.

VI. CONSIDERING THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT

CGC's exploration activities, including the detonation of explosives, destroyed forests, water sources, caves and subterranean rivers, and caused animals to migrate. The state did not contest this (paras 105 and 218). The judgment refers to this impact on the natural environment in its discussion on the 'rights to consultation and to communal property in relation to the *right to cultural identity*', where the 'strong bond that exists between the elements of nature and culture, on the one hand, and each member of the People's sense of being, on the other', is emphasized (para 219). Moreover, the Court addressed the risk that the 1,400 kilograms of remaining explosives posed danger to *the life and physical integrity* of the members of the Sarayaku People, linking it to the state's failure to guarantee their right to communal property (para 248). Only the consequences of the explosives still present on and buried in Sarayaku territory were considered in the section on the rights to life and personal

[46] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) ACHPR 276/2003.

integrity, not the environmental impact of the prior exploration activities – carried out without consultation or consent of the Sarayaku People.

Accordingly, the Court did not assess the consequences of the exploration for the environment as such, and consequently the impact thereof on the right of the Sarayaku People to live in a healthy environment. It is suggested that an explicit consideration of the right to a healthy environment would have been beneficial for at least two reasons. First, subsuming environmental impact under the right to cultural identity obscures the inherent value of the right of all human beings to a healthy environment – with or without a cultural-spiritual link to that environment. Moreover, it disguises the impact of environmental degradation on other domains of life, such as livelihood security. This is particularly relevant for the (indigenous and non-indigenous) communities who mostly depend on the natural environment for their subsistence.

Considering the right to a healthy environment in the *Sarayaku* judgment could be achieved in two ways: (A) through the independent right to a healthy environment, or (B) through the inclusion of this right in the right to life.

A. Adjudicating the Independent Right to a Healthy Environment

A first way to appropriately assess the environmental damage caused by the exploration activities of CGC would be to adjudicate the right to a healthy environment as an independent right. The right of everyone to live in a healthy environment as well as the obligation of states to promote the protection, preservation and improvement of the environment are enshrined in article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights of 1988 (Protocol of San Salvador or PSS).[47]

The formulation of a 'healthy' environment seems to presuppose a link with human health. In the *Sarayaku* case, the water sources that were destroyed were needed to provide drinking water to the community (para 105), but no immediate health impacts were claimed. The question arises whether a link with human health must be demonstrated in order to allege a violation of the right to a healthy environment. Following the Indian Supreme Court in its case of *Rural Litigation and Entitlement Kendra v Uttar Pradesh*, the answer would be 'no'. *In casu*, the petitioner claimed that unauthorized mining had caused environmental damage. The Supreme Court upheld the right to live in a healthy environment,

[47] Ecuador has ratified the Protocol in 1993, which entered into force in 1999.

without establishing harm to human health. In this line of interpretation, 'protection of [the right to live in a healthy environment] may be sought when ongoing behaviour is damaging or likely to damage the environment, regardless of an effect on human health'.[48]

The Inter-American human rights system, however, does not admit individual petitions alleging that a state party violates its obligations in relation to the right to a healthy environment. Only trade union rights (article 8 PSS) and the right to education (article 13 PSS) can be brought before the Inter-American human rights organs through individual petition (article 19(6) PSS). This means that article 11 PSS can only be referred to in petitions alleging violations of other rights of the American Convention and Declaration, on the basis of article 29 ACHR.[49] Citizens who merely claim a violation of their right to live in a healthy environment, cannot bring a case before the Inter-American Commission.[50]

Given the indivisibility and interdependence of human rights, it seems difficult to justify that the justiciability of human rights is limited to certain rights, excluding others. Recognition of a human right in a binding legal instrument should have procedural consequences, that is submitting the compliance with that human right by states parties to judicial or quasi-judicial scrutiny. The current 'discrimination' within human rights, especially when they are recognized in a single legally binding instrument (here the PSS), should therefore be challenged. Concerning the right to a healthy environment in particular, inspiration can be drawn from the African human rights system, where violations of the right of peoples to 'a general satisfactory environment favourable to their development' (article 24 ACHPR) can be claimed, and have been found.[51] Also at national level, litigation is increasingly taking place on the basis of a constitutionally enshrined right to a healthy environment, with Latin America taking the lead.[52]

It is therefore suggested to draft an additional protocol that provides in the possibility to bring individual petitions on the basis of, at least, the

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[48] Carl Bruch et al., 'Constitutional environmental law: Giving force to fundamental principles in Africa' (2001) 26 CJEL 131, 151.

[49] Jorge D Taillant, *Environmental Advocacy and the Inter-American Human Rights System* (Center for International Environmental Law 2001) 36.

[50] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 85.

[51] See for example on oil exploitation, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) ACHPR155/96.

[52] Boyd, (n 50). See also Bruch and others, (n 48).

right to a healthy environment, and, preferably, all the rights established in the PSS. Such an effort would be in line with the evolution in international human rights law of increased submission of human rights performance to (quasi-)judicial scrutiny, as illustrated by the communication procedures for the ICESCR and the Convention on the Rights of the Child (CRC), which were created in 2008 and 2011 respectively.[53] However, given the procedural changes required to be able to consider the right to a healthy environment independently, which cannot be realized overnight, the *Sarayaku* judgment has been rewritten on the basis of the second avenue proposed, namely integrating the right to a healthy environment in the right to life.

B. Integrating the Right to a Healthy Environment in the Right to Life

The Court does not seem to find a *violation* of the right to life in the *Sarayaku* case, at least not explicitly. In the operative part of the judgment, the state is found to be responsible for the 'violation of the rights to' consultation, indigenous communal property, cultural identity, judicial guarantees and judicial protection. By contrast, the Court holds that 'the State is responsible for *severely jeopardizing* the rights to life and to personal integrity' in relation to the obligation to guarantee the right to communal property, to the detriment of the members of the Sarayaku People.[54] The consistency with the formulation in the main text of the judgment ('the State is responsible for *having put at grave risk* the rights to life and physical integrity of the Sarayaku People', para 249)[55] suggests that this nuance in language should be taken into account.[56]

In recent years, the 'greening' of human rights has mushroomed, where '[t]ribunals have come to view environmental protection as essential for the equal enjoyment of, in particular, the rights to life, health, adequate standard of living, home life, and property'.[57] The

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[53] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN Doc A/RES/63/117); Optional Protocol to the Convention on the Rights of the Child on a communications procedure (UN Doc A/RES/66/138).

[54] Emphasis added. Also note that this operative paragraph concerns *members* of the Sarayaku People, whereas the violations were established to the detriment of the Kichwa Indigenous People of Sarayaku.

[55] Here 'people' are referred to (compare n 54).

[56] A comprehensive search of the Inter-American Court's case law database for the use of similar formulations in other judgments was impossible due to the malfunctioning of the search function.

[57] Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011), 436. The European Court of

Inter-American Commission had already noted, in 1997, that '[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being'.[58] In various cases on indigenous peoples' rights in the Inter-American human rights system, environmental degradation was identified as leading to or aggravating certain human rights violations, such as the right to property.[59] The proposed approach goes one step further, however, as it does not only consist in finding a violation of other human rights caused by environmental harm, but integrates an actual *right* to a healthy environment – here in the right to life.

Such integration can also build on evolutions in human rights jurisprudence elsewhere, where the right to a healthy environment is increasingly considered as being included in other human rights.[60] In at least 12 countries where the constitution does not provide a right to a healthy environment, national courts have argued that this right constitutes an essential component of the right to life.[61] The Supreme Court of India has played a pioneering role, stating that the right to life – protected by article 21 of its Constitution – 'encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and sanitation, without which life cannot be enjoyed. Any

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Human Rights, for instance, has found violations of the right to private life and the home (article 8 ECHR) caused by environmental harm. See for example *López Ostra v Spain* (1994) ECHRC-303.

[58] IACHR, *Report on the Situation of Human Rights in Ecuador* (1997) (OEA/Ser.L/V.II.96).

[59] See for example *Awas Tingni v Nicaragua* (n 9); *Saramaka v Suriname* (n 11).

[60] For instance, the European Committee of Social Rights has interpreted the right to protection of health in article 11 of the European Social Charter to include the right to a healthy environment. *Marangopoulos Foundation for Human Rights v Greece* (2006) ECSR 30/2005, para 195. Also at national level, the right to health has been interpreted in relation to a healthy environment. For example, a High Court in South Africa found that the rights to have access to health care services and sufficient water (section 27(1)(a) and (b)) of the South African Bill of Rights) places 'an obligation on all spheres of governance to ensure a healthy environment to the communities' – even though section 24 of the Bill of Rights establishes the independent right of everyone 'to an environment that is not harmful to their health or wellbeing'. *The Federation for Sustainable Environment and The Silobela concerned community v The Minister of Water Affairs and others* (2012) North Gauteng High Court (South Africa) 35672/12, ZAGPPHC 140 (South Africa), para 13.

[61] Boyd (n 50) 82.

contract or action which would cause environmental pollution . . . should be regarded as amounting to a violation of Article 21.'[62]

In the *Sarayaku* case, the integration of the right to a healthy environment in the right to life would imply that the Court would assess not only the impact of the explosives on the life and physical integrity of the Sarayaku People, but also the other environmental damage caused by the exploration activities, such as the destruction of forests and water sources. Consequently, the probability increases[63] that the Court would have found a *violation* of the right to life, instead of only a jeopardization. The judgment has been rewritten from that perspective. Reparation measures must then include not only the appropriate handling of the pentolite, but also the full restoration of environmental degradation, beyond the reforestation currently required (para 294).

VII. MAINSTREAMING CHILDREN'S RIGHTS

Whereas both the petitioners' claim and the Inter-American Commission's admissibility decision explicitly mentioned article 19 ACHR on the rights of the child as possibly violated,[64] this provision was not included in the application submitted by the Commission to the Court.[65] In its Merits Report, the Commission stated that 'it did not have sufficient probative elements to rule on the alleged violation' of the article.[66] Nevertheless, at various places throughout the judgment, the impact on the rights and well-being of children and young people is referred to, by both the representatives of the Sarayaku People and the Court.

Concretely, children and young people are mainly mentioned as regards three matters: (i) the impact on their rights to education and to cultural identity; (ii) the impact on their health and safety; and (iii) their participation. To start, the Court held that 'the interruption of the community's daily activities and the dedication of the adults to the defence

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[62] *Virender Gaur v State of Haryana* (1994) Supreme Court (India) 2 SCC 577.

[63] Given the limited factual information, it is difficult to pronounce with certainty on whether the environmental impact amounted to a violation in the specific case under consideration

[64] IACHR, *Admissibility in re: the Kichwa People of the Sarayaku Community and its Members v Ecuador* (Report n° 64/04 (2004)), paras 2, 20 and 74.

[65] IACHR, *Application to the Inter-American Court of Human Rights in re: the Kichwa People of the Sarayaku Community and its Members v Ecuador* (2010).

[66] IACHR, *Merits in re: the Kichwa People of the Sarayaku Community and its Members v Ecuador* (Report n°138/09 (2009)).

of their territory have had an impact on teaching children and young people about their traditions and cultural rituals, and on perpetuating the spiritual knowledge of the sages' (para 218). Moreover, 'the seismic line passed near sacred sites used for ceremonies initiating young people into adulthood' (para 105). The adverse effects on the education of children and young people were also mentioned in the representatives' demand for compensation of non-pecuniary damage (para 320). They pointed out that in addition to 'the effects on the ancestral education, the education of the children and young people was also affected due to the suspension of classes in schools for three months, during which time the youngest children were left at home and the young people joined the Peace and Life Camps to protect their territory' (note 368).

Second, the impact on the health and safety of children and young people is pointed to. As such, the representatives alleged that 'during the period of food shortages and state of emergency, there were case [sic] of illnesses that mainly affected children and the elderly, a situation described as "fatal to the health of Sarayaku members who were prevented from having access to health care centers," which affected their right to life' (para 234). Moreover, the Court referred to a report of the Human Rights Committee of the Ecuadorian Congress, which concluded that '[h]uman rights have been violated because serious psychological harm was caused to the children of the community who witnessed the confrontations with the soldiers, the police and CGC security personnel' (para 196). In their claims for reparation, the representatives specified the effects on health and safety of children as follows: 'the children have lived in fear of the militarization of the territory and for the fate of their parents' (note 369).

Although the Sarayaku representatives specifically mentioned the impact on children in their demands for reparation, they did not ask for child-specific reparation measures, but for an amount in equity to repair non-pecuniary damage. Following this request, the Court established the sum of US$1,250,000 as compensation for non-pecuniary damage, to be invested as the Sarayaku People see fit, in, among others, 'educational, cultural . . . health care . . .. projects' (para 323). It is commendable that the Court leaves the decision of how to spend the sum to the Sarayaku People, in line with their right to choose their own development path (above). Attention to children is implicitly included in the reference to educational projects.

Finally, during its field visit, the Court's delegation heard various statements from members of the Sarayaku people, 'including young people . . . and children from the community' (para 21). It is positive that children and young people were listened to in the course of the proceedings. According to the Court, these statements 'cannot be assessed

in isolation, but rather within the context of the evidence as a whole, because they are useful insofar as they can provide additional information about the alleged violations and their consequences' (para 49).

Overall, the *Sarayaku* judgment illustrates the tension noticeable in (children's) human rights research, policies and jurisprudence between not artificially separating children from the larger group, on the one hand, and paying sufficient attention to children's specific needs and rights generated by, among others, their age, evolving capacities and legal position, on the other.[67] Especially when attention focuses on another marker of distinctiveness – like indigenousness here – as the generator of particular rights and violations, the danger exists that attention to diversity *within* the indigenous group, for example, for children and young people, decreases or is minimal, which constitutes a risk for both external actors like judges and the indigenous groups themselves. The latter sometimes face intergenerational conflicts, whereby the voices of children and young people may not be sufficiently heard in community decision-making processes.[68] This raises questions as to the appropriateness from a children's rights perspective of 'culturally appropriate procedures' according to which indigenous peoples need to be consulted (para 201), when these procedures do not give space to children and young people.[69]

To a certain extent, both the Sarayaku representatives and the Court incorporate attention to the impact on children and young people in their considerations as regards other (general) human rights, as demonstrated above. However, given the fact that it is acknowledged that children suffered in a different way than adults as regards their education, health and safety, it is somewhat surprising that the Commission did not include article 19 ACHR in its application. Article 19 ACHR guarantees the right of every child 'to the measures of *protection* required by his condition as a minor on the part of his family, society, and the state'.[70] The emphasis on protection reflects the zeitgeist of the American Convention, adopted 20 years before the CRC. In the *Street Children* case, the Court explicitly

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[67] See Didier Reynaert et al., 'Introduction' in Wouter Vandenhole et al. (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 3–6; Ellen Desmet and others, 'Conclusions' in Vandenhole et al. (above) 427.

[68] See for example Natasha Blanchet-Cohen, 'Indigenous children's rights: Opportunities in appropriation and transformation' in Vandenhole et al. (n 67) 371–86.

[69] See also Morten Haugen, 'Deciding on land and resources: How can the influence of the most affected within communities be increased?'(2013) 7 HRILD 262-291 (focusing on women).

[70] Emphasis added.

adopted an integrated approach as regards children's rights: '[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of' article 19 ACHR.[71] In its 2002 Advisory Opinion, the Court emphasized that education and care for the health of children are key special measures of protection implied in article 19 ACHR, referring to other children's rights standards.[72] Given the negative impact on children's education, health and safety in the *Sarayaku* case, an argument could therefore be constructed that the state failed to comply with its obligation to adopt special measures to protect the children whose rights were under threat or violated. However, it must also be acknowledged that the impact was mostly of a temporary nature (for example, suspension of classes for three months), which may not pass the threshold required to find a human rights violation. Therefore, and given the impossibility of evaluating all the evidence, the Commission's decision to not include article 19 ACHR was respected in the rewriting.

Nevertheless, children's rights *were* more explicitly mainstreamed in the rewritten judgment in relation to the following three issues: (i) the justification of hearing children and young people in the Court's field visit (para 21); (ii) the undertaking of consultation processes using culturally appropriate procedures (para 201); and (iii) the reparation for non-pecuniary damage (para 323).

VIII. ACKNOWLEDGING CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

Human rights law has traditionally taken the protection of the individual citizen against the state to heart. Therefore, as a general rule, private actors do not bear direct human rights obligations under international law that trigger their responsibility in case of non-compliance.[73] National bills of

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[71] *'Street Children' (Villagran-Morales et al.) v Guatemala* (1999) IACtHR C 77, para 194.

[72] *Juridical Condition and Human Rights of the Child* (2002) IACtHR OC-17/2002, paras 84 and 86.

[73] Lillian A Miranda, 'The hybrid state-corporate enterprise and violations of indigenous land rights: Theorizing corporate responsibility and accountability under international law' (2007) 11 LCLR 135, 162. The exception is gross human rights violations that constitute international crimes, for which the criminal

rights sometimes do impose duties on private actors, but even then accountability is generally ensured through actions by the state.[74] Nevertheless, in a world of economic globalization the image of 'omnipotent' states is fading, whilst the power and leverage of non-state actors,[75] in particular international financial institutions and (transnational) corporations, accrue. As a result, such non-state actors can be as capable as a state of infringing upon human rights.

Whereas regional and international human rights bodies[76] have acknowledged that human rights can be violated by private actors, they continue to focus on the obligation of the state to protect its citizens against such violations.[77] Likewise, in the *Sarayaku* case, only the international legal responsibility of the state is triggered, notwithstanding that the concrete threat to the Sarayaku People's rights stems from CGC's exploration activities. As such, the judgment is a missed opportunity for the Inter-American Court to explicitly hold that non-state actors have to respect human rights. While it is true that human rights bodies lack jurisdiction over non-state actors to hold them directly liable, the mere fact that there is no remedy to enforce an obligation does not mean that the obligation cannot exist.[78] Accordingly, lack of jurisdiction should not withhold the Inter-American Court from at least expressly recognizing that non-state actors must respect human rights,[79] – while recognizing

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responsibility of natural persons may be established by an international tribunal or court.

[74] See for example Section 8 of the Constitution of the Republic of South Africa, 1996.

[75] The *Sarayaku* case specifically dealt with a transnational corporation. However, the concept of 'non-state actors' as used in this chapter covers all legal persons, including but not limited to corporations (whether transnational or domestic). Whenever the term 'private actors' is used, both natural and legal persons are included.

[76] Aoife Nolan, 'Addressing economic and social rights violations by non-state actors through the role of the state: A comparison of regional approaches to the "obligation to protect"' (2009) 9 HRLR 225. See for example the African Commission's decision in *Social and Economic Rights Action Center (SERAC) v Nigeria* (n 51).

[77] Nolan, (n 76).

[78] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), 74 and 267.

[79] The type of human rights obligations that could be imposed on non-state actors is one of the most contentious issues in the debate concerning business and human rights, and was one of the reasons why the UN Norms were never adopted by the Human Rights Council. However, the duty to respect does not only require non-state actors to do no harm, but also to take the positive action directly required for their activities not to be harmful to human rights.

that, for the time being, the state remains responsible for enforcing these duties of non-state actors.

For instance, in the judgment the Court emphasizes the duty to consult[80] of the state of Ecuador. However, when a collaborative project, such as an oil concession, risks infringing on human rights, both state and non-state actors should bear human rights obligations.[81] Without any prejudice to the duty of states to consult before adopting legislative and administrative measures that affect indigenous peoples, non-state actors that execute a specific decision that touches upon these peoples' rights should equally consult them.[82] In addition, non-state actors should refrain from engaging with a particular state, when they know or ought to know that this state has violated its human rights obligations, for instance by having failed to consult.[83] States thus remain primarily responsible for human rights, but their responsibility is complemented by duties for non-state actors that must be complied with simultaneously, *not* subsidiarily.[84] These complementary and simultaneous obligations would bolster the protection of indigenous rights, in particular, and of human rights, in general.[85]

Reference can be made in this regard to the idea of 'common but differentiated responsibilities' that exists in environmental law. According to this idea, developed and developing states have common responsibilities to protect the environment and to promote sustainable development, but the content of their respective responsibilities differs depending on a given state's social, economic and ecological situation.[86] Similarly, state and non-state actors have a common responsibility vis-à-vis human rights, but their respective duties are different in view of their distinct involvement in the particular situation that risks interference with human rights.

The Inter-American Court could find support for such direct acknowledgment of the human rights obligations of non-state actors

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[80] In this section the 'duty to consult' should be understood as amounting to a duty to obtain the FPIC of indigenous peoples, when required as discussed earlier ().

[81] Miranda, (n 73).

[82] See also ibid, 178.

[83] ibid, 178–9.

[84] For a discussion of how obligations can be attributed to different actors, see for example Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Towards Foundational Principles for a Multi Duty-Bearer Human Rights Regime* (Routledge 2015).

[85] See also Miranda (n 73) 154–5.

[86] Principle 7 of the Rio Declaration on Environment and Development of 1992, adopted by the United Nations Conference on Environment and Development having met at Rio de Janeiro from 3 to 14 June 1992.

not only in (emerging) human rights law, but also in other branches of international law, in particular criminal and environmental law. First, there are various international soft law instruments in which non-state actors accept, on a voluntary basis, a moral responsibility to respect human rights. An example is the UN Global Compact, which proclaims in its first two principles that 'businesses should support and respect the protection of internationally proclaimed human rights', and 'make sure that they are not complicit in human rights abuses'.[87] In the UN Framework and Guiding Principles on business and human rights, UN Special Rapporteur John Ruggie endorsed the idea that non-state actors should act with due diligence and in conformity with their responsibility to respect human rights.[88] Such corporate social responsibility is also reflected in the work of UN treaty monitoring bodies. For instance, the UN Committee on Economic, Social and Cultural Rights acknowledges that companies have human rights responsibilities, but that their accountability for non-compliance has to be ensured by the state.[89]

Whilst international human rights law currently falls short of explicitly recognizing that non-state actors bear human rights *obligations* as opposed to mere moral *responsibilities*, international environmental law has imposed direct duties on non-state actors in some instances. For example, the Convention on Civil Liability for Oil Pollution and the Convention on the Protection of the Environment through Criminal Law stipulate obligations for non-state actors that state parties should implement in their domestic legal system.[90] An important step has also been taken in international criminal law, since the proposed amendments to the Draft Protocol of the African Court of Justice and Human Rights establish jurisdiction of the African Court over legal persons for international crimes, such as the most egregious human rights violations.[91]

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[87] See UN Global Compact, 'The Ten Principles', accessed 17 March 2017 at https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

[88] See Principle 11 of the Guiding Principles on Business and Human Rights, (n 39).

[89] See for example CESCR, 'General Comment 12: The Right to Adequate Food (Art 11)' (UN Doc E/C.12/1999/5), para 20.

[90] International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, 973 UNTS 3; Council of Europe Convention on the Protection of the Environment through Criminal Law of 4 November 1988, CETS 172.

[91] Cases can only be brought by the prosecutor, however. Articles 28A and 34A of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, as adopted at the 23rd ordinary session of the Assembly of the African Union (Assembly/AU/Dec.529 (XXIII) 2014).

Nonetheless, the most pertinent source of guidance for the Inter-American Court are best practices from domestic judiciaries in states where human rights apply to both state and private actors. One such example is South Africa,[92] where the Constitution explicitly acknowledges that private actors have human rights obligations. In accordance with the subsidiarity principle, however, rather than directly applying the Constitution to companies, judges first try to enforce the human rights duties of companies by interpreting, applying and – when common law rules are concerned – developing, existing private law.[93] In any case, the practical importance of such jurisprudence is that, on the one hand, non-state actors are plainly held to be bound by the Bill of Rights and, on the other hand, they are cited as interested parties in the proceedings because although the relief is ordered against the state, the judgment is likely to have a direct impact on them.[94]

What is proposed *in concreto* in the rewritten judgment is that the Inter-American Court explicitly holds that not only the state of Ecuador but also CGC has obligations in terms of the ACHR (see for example, para 177*bis*). The practical implications thereof are threefold. First, the Court should scrutinize the conduct of the non-state actor more closely and thereby contribute to building a framework of complementary human rights obligations between states and non-state actors.[95] Second, this idea of complementary obligations should be reflected in the reparations. Even though such relief can only directly target the state,[96] the concrete consequences for non-state actors could come to the surface more clearly. For instance, the Court should order the state to ensure that non-state actors executing a project affecting the rights of indigenous communities consult them. Furthermore, the state should encourage the participation of non-state actors to the training programs or courses, which were

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[92] See for example *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others* (2011) Constitutional Court (South Africa) CCT 29/10 [2011] ZACC 13 and *Boycott, Divestment And Sanctions South Africa and Another v Continental Outdoor Media (Pty) Ltd. and Others* (2014) High Court (South Africa) 2013/19700 [2014] ZAGPJHC 200.

[93] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (2010) Constitutional Court (South Africa) CCT 39/10 [2010] ZACC 26.

[94] For instance, in *Bengwenyama v Genorah* (n 93) the Constitutional Court set aside the decision of the responsible authorities to grant a prospecting right to Genorah.

[95] See also Miranda (n 73) 183.

[96] Contra ibid, 179–80 (alluding to the possibility of imposing damages or sanctions directly on non-state actors).

ordered by the Court, on indigenous peoples' rights and on engaging with such communities.

Third, the Inter-American Court should acknowledge that since CGC was responsible for degrading the environment within the Sarayaku territory, the company should in principle also bear the costs of the restoration. This would also correspond to the polluter pays principle in international environmental law, which aims at the internalization of environmental costs: the polluter should bear the expenses of preventing and controlling the pollution.[97] 'Pollution' has been defined as 'the introduction by man, directly or indirectly, of substance or energy into the [environment] resulting in deleterious effects of such a nature as to endanger human health [and] harm living resources'.[98] There is no doubt that the placement of explosives in the Sarayaku territory constitutes such pollution, given that the Court has held that the state, by allowing explosives to be introduced in the territory, was responsible for having put the community's rights to life and physical integrity at grave risk (paras 248–249). Guidance is again provided by the jurisprudence of the Indian Supreme Court, which plays a leadership role in applying the polluter pays principle and has held that 'it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action'[99] and, more even, that under the polluter pays principle the polluter should not only compensate the victims but also bear the cost of restoring the environmental degradation.[100] Accordingly, the rewritten judgment incorporates the polluter pays principle by holding, *inter alia*, that the state could recover the costs of removing the pentolite from CGC (see, for example, para 246).

An important difference between the rewritten judgment and the approach of the South African judiciary explained earlier is that non-state actors cannot be cited before the Inter-American Court, which lacks

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[97] See OECD Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies, Annex I, 1972. See also Principle 16 of the Rio Declaration (in a weakened form) (n 77).

[98] Anton and Shelton (n 57) 438. Definition inspired by article 1 of the Convention on Long-Range Transboundary Air Pollution of 1979 and other environmental treaties.

[99] *Indian Council for Enviro-Legal Action v Union of India* (1996) Supreme Court (India) 3 SCC 212.

[100] *Vellore Citizens Welfare Forum v Union Of India & Ors* (1996) Supreme Court (India) 5 SCC 647. However, these principles have 'neither been followed consistently nor been institutionalized to make a long term impact for the environmental jurisprudence process'. G Sahu, 'Implications of Indian Supreme Court's innovations for environmental jurisprudence' (2008) 4 LEDJ 385.

competence over non-state actors. Admittedly, however, this also deprives non-state actors of an opportunity to explain their conduct or policies when these are scrutinized by the Court, although they should be able to defend themselves within the domestic legal system, when the state indeed holds them accountable through domestic remedies.[101] In the *Sarayaku* case, however, the liability of CGC was excluded by the Deed of Termination, which stipulated that the contractor would not incur any environmental liability. The Inter-American Court should have denounced this agreement, since it prevents the Sarayaku People from holding CGC accountable for the environmental degradation (see for example, para 177*quinquies*).

IX. INTRODUCING AN INTEGRATED APPROACH TO RIGHTS HOLDERS

Until now, this chapter has focused on an integrated approach to human rights norms. We end with a reflection regarding the second aspect of an integrated view to human rights, as proposed by Brems, namely the 'maximum inclusion of rights holders'. This requires 'taking into account the human rights of all rights holders whose rights are affected by a particular situation'.[102] In the *Sarayaku* case, it is mentioned that various neighbouring communities signed agreements with the oil company, which in return invested in infrastructure, production projects, health and education as compensation for the seismic survey activities (paras 74 and 82). The fact that these communities entered into an agreement with the company does not mean, however, that their rights (to be consulted by the government, for instance) have not been affected. The Court also explicitly referred to the existence of other potentially affected rights holders:[103]

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[101] Nevertheless, they are able to defend themselves within the domestic legal system, at which level their accountability is enforced.

[102] Eva Brems, 'Should pluriform human rights become one? Exploring the benefits of human rights integration' (2014) 3 EJHR 447, 452.

[103] In its field visit, the Court adopted a rather ambiguous approach. The state had requested a visit to the 'Rio Bobonaza communities'. However, since the complaint referred to events that occurred on Sarayaku territory and its surroundings, it was decided to limit the visit to that territory 'which is not affected by the fact that a visit was also made to the community that lives in the area known as Jatun Molino, in response to the corresponding proposal by the representatives and the State' (n 21), 'where they listened to some of the local people' (para 21). The Court took this information into account as contextual information, 'but will not make any determination as regards that community' (para 50).

> The Court is aware that [the Sarayaku] community lives in a territory where there are other indigenous communities and that, naturally, links exist between them and there may be both divergent and converging interests and rights of other communities. However, in the context of the present case, it is not for this Court to make determinations regarding other communities, populations or persons who are not petitioners in this case. (note 21)

This holding seems to point to a kind of uneasiness from the Court with its limitation *ratione personae* of making determinations. It recognizes that there are individuals and communities with interests and rights that concur or conflict with those of the petitioners, who are not considered in the case at hand. These other persons and groups may or may not have suffered from human rights violations. If violations did occur, they may not have disposed of the human, financial and/or technical resources to submit a complaint before the Inter-American human rights system, or may not have been interested in doing so. The reparations granted to the petitioners may however lead to inequalities on the ground between the 'haves' of a judgment and reparations – upon the condition of effective implementation – and the 'have-nots'. This may heat up local dynamics especially when, as in the present case, the relationships between the petitioners and the neighbouring communities are already seriously disrupted (para 234). These consequences are, however, inherent to the current way of functioning of judicial and quasi-judicial proceedings, which only consider the rights of *applicants*.[104]

How could a more inclusive approach to rights holders be achieved, in a way that remains feasible and manageable for the Court? The Court is formally not in the position to make determinations regarding persons or groups who are not petitioners in a case.[105] Nevertheless, at the level of the Inter-American Commission, the system provides the procedural possibility to adopt a more comprehensive approach to rights holders.

Only the Commission and state parties may submit a case before the Court (article 61(1) ACHR). There is a very broad provision as to who has standing to file a petition before the Commission, namely '[a]ny person or group of persons, or any nongovernmental entity legally recognized' (article 44 ACHR). More important here is that the Commission may also initiate a petition *motu proprio*, when it considers that the neces-

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[104] Brems (n 102) 453.

[105] The Court has allowed petitioners to add new victims (mostly next of kin) after the case was submitted to it by the Commission, on the basis of the *jura novit curia* principle. This broad application has been criticized in that the proceedings before the Commission are long enough to be able to add all relevant facts – and victims – to the case at that stage. See Shelton (n 17) 208.

sary requirements are met (article 24 Rules of Procedure IACHR of 2009; formerly article 26(2) of the Regulations of the IACHR of 1992). In *Blake v Guatemala*, the Court interpreted this provision as referring to the possibility not only of filing a 'new' petition, but also of including other victims in an existing application.[106] In that case, a journalist (Mr Blake) and a photographer (Mr Davis) had been killed in 1985 by Guatemalan civil patrons. Their remains were only discovered in 1992, whereby Mr Davis was identified before Mr Blake (para 52(a) and (b)). Nevertheless, the case submitted before the Court only concerned Mr Blake. The Court was 'surprised that the Commission did not use its authority' to add Mr Davis as a victim (para 85), but the Commission's justification was that his relatives were not interested in filing a petition. The Court however confirmed the Commission's authority 'to act *motu proprio* on the basis of any available information, even without an explicit petition of Mr. Griffith Davis' relatives' (para 85). Since this had not been done, the Court could only rule on the events as regards Mr Blake.

There is thus an explicit procedural opening in the Inter-American human rights system to achieve a more inclusive approach to rights holders in a particular case, namely on the basis of a *motu proprio* action of the Commission. Shelton has argued against this possibility, holding that '[a]ny perceived additional victims should be informed of the right to bring their own petition and should not be added to the petition under consideration, thereby diluting attention to claims of the primary victim'.[107] If the additional victims are next of kin of the primary victim, the risk of dilution of attention to the claims of the primary victim may indeed be there, since the next of kin can be considered secondary victims. If, however, other persons or groups are also direct victims of the same events, it does not seem justified, from a human rights perspective, to exclude them from recognition and remedies.

In this sense, one could wonder if – from a human rights integration viewpoint – one should not move from a 'personal' approach in (quasi-)judicial proceedings (focusing on the petitioners) to a more 'factual/case-based' approach. This would turn around the reasoning, whereby the Commission would not assess the human rights violations *caused to a certain person or group*, but would assess the human rights violations *caused by certain acts or omissions* from a more holistic perspective, for a broader range of victims than only the petitioners who submitted the complaint under consideration. Such a case-based

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106 *Blake v Guatemala* (1998) IACtHR C 36.
107 Shelton (n 17), 210.

approach could draw inspiration from the functioning of Truth and Reconciliation Commissions, which in their mandate first focus on the events to be investigated (for example, gross violations of human rights and/or violations of international humanitarian law) and then on the identification of persons involved.[108] Moreover, support can even be found in a careful reading of article 63(1) ACHR itself: 'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that *the injured party* be ensured the enjoyment of his right or freedom that was violated'.[109] The provision does not require the injured party to be an *applicant*.

Arguably, such a case-based approach would imply a radical change of the functioning of the current human rights system, with many challenges to think about and stings to remove. In the rewritten judgment, an *obiter dictum* has been included as a first step in this direction (paras 284*bis*–284*ter*). From an integrative perspective to human rights holders, it seems worthwhile to further explore the potential of a case-based approach to human rights violations.

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[108] See for example article 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) and article IV of an Act to Establish the Truth and Reconciliation Commission of Liberia, 2005 (Liberia).

[109] Emphasis added.

APPENDIX

INTER-AMERICAN COURT OF HUMAN RIGHTS CASE OF THE KICHWA INDIGENOUS PEOPLE OF SARAYAKU *v* ECUADOR JUDGMENT OF JUNE 27, 2012 *(Merits and reparations)*

21. For the first time in the history of the Inter-American Court's judicial practice, a delegation of judges conducted a proceeding at the site of the events of a contentious case submitted to its jurisdiction. Thus, on April 21, 2012, a delegation from the Court, accompanied by delegations from the Commission, the representatives, and the State, visited the territory of the Sarayaku People. Upon arrival, the delegations were received by numerous members of the Sarayaku People. After crossing the Bobonaza River in canoes, they went to the People's assembly house (*Tayjasaruta*), where they were received by the President, José Gualinga, the *kurakas*, the *yachaks* and other authorities and members of the People. Also present were representatives from other indigenous communities of Ecuador. There, the Court's delegation heard numerous statements from members of the Sarayaku, including young people, women, men, the elderly and children **(given the right of children to express their views on matters that affect them, and to these views being given due weight in accordance with their age and maturity, as enshrined in Article 12 of the Convention on the Rights of the Child (CRC))** from the community, who shared their experiences, views and expectations about their way of life, their worldview and their experience in relation to the facts of the case. The President of the Court also gave the members of the delegations an opportunity to express their views. At that point, the Secretary for Legal Affairs of the Presidency of the Republic, Alexis Mera, formally acknowledged the State's responsibility (*infra* paras. 23 and 24). Lastly, the delegations went on a walking tour around the community, specifically the center of Sarayaku, where the People performed various cultural activities and rituals. The delegations also overflew the territory, observing the places where the events of the case occurred. Subsequently, the delegations visited the village of Jatun Molino, where they listened to some of the local people.

. . .

VIII. MERITS

VIII.1 THE INTERPRETATION OF THE AMERICAN CONVENTION IN THE PRESENT CASE

123*bis*. The rights of indigenous peoples in terms of the American Convention, in particular their right not to be discriminated (Article 1(1)), their right to communal ownership (Article 21), their right to political participation (Article 23), their right to cultural identity (Articles 1(1) and 26) and their economic and social rights (Article 26) have to be applied in conformity with Article 29(b) of the Convention, which prohibits an interpretation of any provision of the Convention in a manner that restricts its enjoyment to a lesser degree than what is recognized in the domestic laws of the State in question or in another treaty to which the State is a party.

123*ter*. Ecuador has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO Convention 169), and has voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

123*quater*. The Committee on Economic, Social, and Cultural Right has interpreted common Article 1 of the ICCPR and the ICESCR as being applicable to indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence".

123*quinquies*. In addition, Article 7(1) of ILO Convention 169 provides that indigenous peoples have the right to decide their own priorities for the process of development that affects them and to exercise control, to the extent possible, over their own economic, social and cultural development. "They shall [also] participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

123*sexies*. Finally, indigenous peoples have a right to self-determination in terms of Article 3 UNDRIP, according to which they have the right to freely determine their political status and freely pursue their economic, social and cultural development.

123*septies*. Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 in a manner that restricts the enjoyment and exercise of the right to property to a lesser degree than what is recognized in the instruments cited above. Hence, in light of indigenous

peoples' right to self-determination in terms of Common Article 1 ICCPR and ICESCR and Article 3 UNDRIP and their right to decide on their development in terms of Article 7(1) of ILO Convention 169, Articles 1(1), 21, 23 and 26 of the American Convention must be interpreted in accordance with the right to self-determination of indigenous peoples. Accordingly, the Sarayaku have the right to enjoy property in accordance with their communal tradition, and to freely pursue the social, cultural and economic development of their choice.

VIII.2 RIGHTS TO CONSULTATION AND TO INDIGENOUS COMMUNAL PROPERTY

124. In this case, it must be determined whether the State adequately respected and guaranteed the rights of the Sarayaku People that were allegedly violated, by granting a contract for oil exploration and exploitation on their territory to a private company; by implementing this contract and by the occurrence of a series of related events. Even though the State acknowledged that it had failed to conduct prior consultations in this case, during the litigation, it questioned its obligation to do so and argued that certain actions taken by the company satisfied the requirement to consult the indigenous communities of the area granted in concession. Unlike other cases heard by this Court, in this case there is no doubt regarding the right of the Sarayaku People to their territory, which has been fully acknowledged by the State in domestic proceedings (*supra* paras. 55, 61 and 62) and as an undisputed fact before the Court. The Court will now analyze: (a) the arguments of the parties, and (b) the obligation to guarantee the right to consultation, in relation to the **[right]** to communal property **[*fragment deleted*]** of the Sarayaku People.

B. The obligation to guarantee the right to consultation in relation to the rights to indigenous communal property and cultural identity of the Sarayaku People

B.1 The right to communal indigenous property

. . .

145. Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these. . . . Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each

people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.

146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to **[*fragment deleted*] choose their own development path**. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can **[*fragment deleted*] choose their own development path**, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.

147. Furthermore, lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through **[*fragment deleted*] activities that form part of their culture**; or from having access to their **[*fragment deleted*] specific** health systems and other socio-cultural functions, thereby exposing them to poor or infrahuman living conditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can lead to the violation of various human rights, as well as causing them suffering and jeopardizing **[*fragment deleted*]** their **particular** way of life, customs and language.

B.4 Measures of protection to guarantee the right to communal property

156. The Inter-American Court has indicated that when States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories and natural resources, certain guidelines must be respected. Thus . . . "the American Convention and the Court's case law provide guidelines to define the admissible restrictions," which must be established by law, necessary, proportionate and aimed at achieving a legitimate objective in a democratic society

without denying their right to exist as a people. The Court has also stated that, in cases concerning natural resources on the territory of an indigenous community, in addition to the above criteria, the State is must verify that these restrictions do not entail a denial of the survival of the indigenous people themselves. **In light of Common Article 1 ICCPR and ICESCR, Article 3 UNDRIP and Article 7(1) of ILO Convention 169, any limitations on the rights of indigenous peoples over their lands, territories and resources must respect their right to choose their own development path.**

157. For this reason, in the case of *Saramaka v. Suriname*, the Court established that, to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees the right to consultation **of indigenous peoples and, where applicable (*infra*), their free, prior and informed consent**; (ii) conduct an environmental **and human rights** impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions.

. . .

B.5 The State's obligation to guarantee the right to consultation of the Sarayaku People ***and, where applicable, to obtain their free, prior and informed consent***

159. The Court observes that, in general, the close relationship between the indigenous communities and their land has an essential component, which is their cultural identity based on their specific worldviews, which, as distinct social and political actors in multicultural societies, must receive particular recognition and respect in a democratic society. Respect for the right to consultation of indigenous and tribal communities and peoples gives effect to **[*fragment deleted*]** their **right to choose their own development path [*fragment deleted*]** in a pluralistic, multicultural and democratic society.

160. Based on all the above, one of the fundamental guarantees to ensure **[*fragment deleted*] indigenous peoples' right to choose their own development path in conformity with their right to self-determination under Common**

Article 1 ICCPR and ICESCR, Article 3 UNDRIP and Article 7(1) of ILO Convention 169and, accordingly, their participation in decisions regarding measures that affect their rights and, in particular, their right to communal property **under Article 21 of the American Convention**, is precisely the recognition of their right to consultation **[*fragment deleted*] and, where applicable, the requirement to obtain their free, prior and informed consent.**

. . .

165*bis*. Additionally, the Court considers that in specific circumstances the State has a duty not only to consult with indigenous peoples, but also to obtain their free, prior and informed consent according to their customs and traditions.

165*ter*. First, consent is required in cases of relocation (Article 16 ILO Convention 169 and Article 10 UNDRIP) and for the storage or disposal of hazardous materials in the lands or territories of indigenous peoples (Article 29(2) UNDRIP).

165*quater*. Second, in the case of *Saramaka v. Suriname*, the Court established that States have a duty to obtain the free, prior and informed consent of indigenous communities for "large-scale development or investment projects that would have a major impact" within indigenous territories.[110] The degree of impact must be assessed in light of the results of the human rights impact assessment. Such an assessment determines the current human rights situation, predicts the potential impacts, both positive and negative, of the envisaged project on the human rights of the people concerned – in particular their ability to continue to foresee in their subsistence – assesses the probability that such effects will occur, identifies measures to mitigate or prevent negative effects and to maximize positive effects, and proposes possible alternatives.

165*quinquies*. The Court believes that consent is required for extractive projects within indigenous territories given the invasive nature of such projects. This is supported *inter alia* by the report on extractive industries and indigenous peoples by James Anaya, UN Special Rapporteur on the rights of indigenous peoples.[111] Also the Committee on the Elimination of all

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[110] *Saramaka People v Suriname* (2007) IACtHR C 172, para 134.

[111] UN Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples* (UN Doc. A/HRC/24/41 (2013)).

Forms of Racial Discrimination held in its concluding observations regarding Ecuador that for the exploitation of subsoil resources mere consultation is insufficient and that the prior informed consent of communities has to be sought.[112]

166. The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure that may affect their rights, as recognized under domestic and international law, **which, where applicable, amounts to an obligation to obtain their consent,** as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)) **and the right to participate in government (Article 23)**. **The obligation to guarantee that indigenous peoples can effectively exercise their communal property rights and their right to participate in government** entails the duty to organize appropriately the entire government apparatus, and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights, **in conformity with Articles 1(1), 21 and 23 of the Convention as interpreted in light of Common Article 1 ICCPR and ICESCR, Article 3 UNDRIP and Article 7(1) of ILO Convention 169**. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.

. . .

171. The effective protection of indigenous communal property, in the terms of Article 21 of the Convention in relation to Articles 1(1) and 2 of this instrument, imposes on States the positive obligation to adopt

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See also e.g. UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, *Human rights and indigenous issues* (UN Doc. E/CN.4/2003/90 (2003)) and CESCR, *Concluding observations on the third periodic report of Ecuador* (UN Doc. E/C.12/ECU/CO/3 (2012)).

[112] CERD, *Concluding observations on the combined 17th to 19th periodic reports of Ecuador* (UN Doc. CERD/C/ECU/CO/19).

special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied. [***fragment deleted***]

172. . . . It has not been contested that the company opened seismic lines, established heliports, destroyed caves, and water sources and subterranean rivers that provided the community's drinking water; cut trees and plants of environmental, cultural and nutritional value to the Sarayaku, and placed powerful explosives on the surface and in the subsoil of the territory (*supra* para. 105).

. . .

174. In this case . . . the oil concession involved seismic work over a significant area of the Sarayaku territory that would substantially affect it, given the inherent and probable impacts of an oil project in the jungle. The total area that would be affected by the project on the Sarayaku territory included primary forest, sacred sites, areas for hunting, fishing and food gathering, medicinal plants and trees, and places used for cultural rites . . .

174*bis*. Given the invasive nature of oil exploration and exploitation on the Sarayaku territory, the Court considers that merely consulting the community would have been insufficient. The free, prior and informed consent of the Sarayaku People should have been obtained.

175. Indeed, it should be noted that the Sarayaku People always opposed the company's entry into its territory . . .

176. Given that ILO Convention 169**, as supported by UNDRIP,** is applicable with regard to the subsequent impacts and decisions resulting from oil projects, even when the latter had been contracted prior to its entry into force it is evident that, at least since May 1999 the State had the obligation to guarantee the right to prior consultation of the Sarayaku People, in relation to their right to communal property **[*fragment deleted*]**, in order to ensure that the implementation of the said concession would not harm their ancestral territory, or their subsistence and survival as an indigenous people **nor violate their right to choose their own development path**.

B.5 Application of the right to consultation of the Sarayaku People ***and the obligation to obtain their consent*** *in this case*

177. The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. **Where applicable (*supra*), the free, prior and informed consent of indigenous peoples must be obtained.** Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.

177*bis*. Without any prejudice to the State's obligation to consult, non-state actors that execute projects that have or may have a major impact on indigenous peoples' rights have an obligation to respect the rights of the affected peoples. This obligation to respect imposes at least the following two duties.

177*ter*. First, these non-state actors must refuse to enter into a joint enterprise with a State, when they knew or ought to have known that the State failed to comply with its obligation to respect indigenous rights, including its duty to consult and, where applicable, to obtain the free, prior and informed consent of the affected community.

177*quater*. Second, these non-state actors must also consult with the affected indigenous communities prior to launching their operations. Where applicable, this duty to consult amounts to a duty to obtain their consent. During the negotiations both the non-state actors involved and the affected communities must act in good faith and within the framework of the consultations conducted with the State. Since the State remains primarily responsible to protect the rights of indigenous peoples, it has to regulate and monitor the negotiation process between non-state actors and indigenous communities, and must ensure accountability on the part of all actors involved

for non-compliance with their respective duties and for the commitments entered into.

177*quinquies*. Accordingly, both the State and the non-state actor, in this case CGC, have a common responsibility to respect indigenous rights. Their respective obligations are complementary and apply simultaneously. The State bears the primary obligation and has to ensure, within its domestic legal system, accountability of the non-state actor for non-compliance with its human rights duties. In this regard, the Court strongly denounces the Deed of Termination concluded between the State of Ecuador and CGC, which provides that no environmental liability can be attributed to the contractor.

178. Thus, it is necessary to determine the manner and sense in which the State had an obligation to guarantee the Sarayaku People's right to consultation and whether the actions of the concessionaire company, which the State described as forms of "socialization" or attempts to reach an "understanding," satisfy the minimum standards and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity. To this end, the Court must analyze the facts, recapitulating some of the essential elements of the right to consultation, taking into account inter-American case law and norms, State practice, and the evolution of international law. This analysis will be made as follows: (a) the prior nature of the consultation; (b) good faith and the aim of reaching an agreement; (c) appropriate and accessible consultation; (d) the environmental impact assessment, and (e) informed consultation.

a) Consultation must be carried out in advance

. . .

183. Having established that the State was obliged to carry out a prior consultation process in relation to the subsequent impacts and decisions arising from the oil exploration contract, at least since 1998 (*supra* para. 172), the State should have ensured the participation of the Sarayaku People and, consequently, that no actions to implement the concession were carried out on their territory without consulting them previously**, and obtaining their consent.**

184. Thus, it has not been contested that the State did not carry out any type of consultation with the Sarayaku, at any stage of the imple-

mentation of oil exploration activities, through their institutions and representative bodies. In particular, the People were not consulted prior to**, and could thus also not have agreed to,** the construction of the heliports, the preparation of the trails, the burial of the explosives, or the destruction of areas of great significance to their culture and worldview.

184*bis*. By entering into an agreement with the State notwithstanding the State's failure to comply with its duty to consult and to obtain the free, prior and informed consent of the Sarayaku People, CGC violated its obligation to respect the rights of the Sarayaku. Furthermore, CGC did not acquit its duty to consult and conclude an agreement with the Sarayaku either, because following its failure to reach "an understanding", the company decided to abandon its "consultation" process and to begin its activities without the consent of the Sarayaku People.

b) Good faith and the aim of reaching an agreement

. . .

187. **[*fragment deleted*] The obligations of the State and the non-state actor executing the project in the indigenous territories to consult the affected communities, and where applicable, to obtain their consent are complementary and apply simultaneously. The State cannot avoid its duty to consult [*fragment deleted*]** by delegating it to a private company or to third parties. **[*fragment deleted*] Furthermore, in conformity with its obligation to protect indigenous rights, the State has to adopt measures to observe, supervise, monitor or participate in the consultation process between the non-state actor and the affected community so as to safeguard the rights of that community and, in particular, to ensure equality of arms.**

. . .

189. During the Court delegation's visit to the Sarayaku territory, when accepting its responsibility in this case, the State acknowledged that it had not carried out a proper prior consultation process (*supra* para. 23).

189*bis*. In addition to the lack of consultation by the State, the private oil company did not satisfy its obligation to consult with the Sarayaku either, since the "consultations" were not conducted in good faith, and the "consultation" process was eventually abandoned.

190. . . . members of Sarayaku indicated that there had been a military presence on Sarayaku territory during the CGC incursions and that the purpose of this presence was to ensure that the company could carry out its work, in view of their opposition. . . .

. . .

193. Thus, . . . the State supported the oil exploration activities of the CGC by providing security with members of its armed forces at certain times, which did not promote a climate of trust and mutual respect in order to reach a consensus between the parties.

194. In addition, the company's actions . . . failed to respect the established structures of authority and representation within and outside the communities. The CGC merely offered money and different economic benefits . . . in order to obtain their consent to carry out activities to explore for and exploit the natural resources on their territory, without the State undertaking or monitoring a systematic and flexible process of participation and dialogue with them. It was also alleged, and was not contested by the State, that the CGC had used fraudulent procedures to obtain signatures of support from members of the Sarayaku Community (*supra* para. 73).

. . .

198. Thus . . . the State's failure to conduct a serious and responsible consultation, at a time of high tension in inter-community relations and with State authorities, encouraged, by omission, a climate of conflict, division and confrontation between the indigenous communities of the area, in particular with the Sarayaku People . . .

199. In other words, the State **did not only fail to consult with the Sarayaku People, but also failed to regulate and monitor the consultations between CGC and the community, and [*fragment deleted*]** discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract. **The private company subsequently used this situation to obtain the consent of some other communities through malicious means while ignoring the opposition by the Sarayaku People.**

[*fragment deleted*]

c) Adequate and accessible consultation

201. This Court has established in other cases that consultations with indigenous peoples must be undertaken using culturally appropriate procedures; in other words, in keeping with their own traditions . . .

202*bis*. In these consultation processes, the rights of children to express their views on matters that affect them, their views being given due weight in accordance with their age and maturity (Article 12 CRC), should be guaranteed.

203. In this case, the Court has found it proved that **the State did not conduct any consultations, whereas** the oil company attempted to negotiate directly with some members of the Sarayaku People, **but** without respecting their form of political organization. **[*fragment deleted*]** Accordingly, the Court considers that the actions carried out by the CGC cannot be construed as an appropriate and accessible consultation.

. . .

e) The consultation must be informed

208. As indicated previously, the consultation must be informed, in the sense that the indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks. Thus, prior consultation requires that the State receive and provide information, and involves constant communication between the parties. The case law of the domestic courts and laws has referred to this aspect of the consultation. **As regards the negotiations between non-state actors executing projects and the affected community, the State must ensure that all parties involved have access to all relevant information in order to ensure equality of arms.**

. . .

211. In conclusion, the Court has verified that the State did not conduct an appropriate and effective process that would guarantee the right to consultation of the Sarayaku People before **[*fragment deleted*]** authorizing the program of exploration or exploitation of resources on their territory. **[*fragment deleted*] Nor did the contacts between CGC and the Sarayaku People prior to the company executing its activities satisfy** the minimum requirements of a prior consultation. In short, the Sarayaku People were not consulted**, neither** by the State **[*fragment deleted*], nor by the** company **[*fragment deleted*] prior to carrying out** oil exploration activities, **[*fragment*

***deleted*] including planting** explosives **[*fragment deleted*] and carrying out other acts adversely affecting** sites of special cultural value. All this was acknowledged by the State and, in any case, has been verified by the Court from the evidence submitted.

[*original paragraphs deleted*]

B.6 Obligation to adopt provisions of domestic law

222. Despite the fact that . . . **both** the State **and the non-state actor executing the project were [*fragment deleted*]** obliged to consult the Sarayaku People, the Court has no information that, before December 9, 2002, the State had detailed regulations on prior consultation that established, *inter alia*, the moment at which the consultation should take place, its purpose, those who should be consulted, the phases of the implementation of activities for which prior consultation was required, the formalization of decisions taken during the consultation or the compensation for the socio-environmental damage caused by the exploitation of natural resources, particularly hydrocarbons . . .

. . .

227. Based on all the above, this Court finds that the State is responsible for failing to comply with its obligation to adopt domestic legal measures established in Article 2 of the American Convention, in relation to the violations of the rights to consultation **[*fragment deleted*]** and property that have been declared.

VIII.2 Right to freedom of Movement and Residence

228. A number of situations are alleged to have occurred in which third parties or even State agents obstructed or impeded the transit of Sarayaku members along the Bobonaza river. It is clear that the State was aware of situations that affected the free movement of members of the Sarayaku People along the river. However, insufficient evidence was provided to examine these facts under Article 22 of the Convention.

229. Nevertheless, the fact that pentolite explosives were buried on the Sarayaku People's territory has certainly entailed an unlawful restriction on their movement, and on their hunting and other traditional activities in certain sectors of their property, owing to the obvious risks to their life and integrity. However the effects of this situation have been, and

will be, examined under their right to communal property and to prior consultation, as well as under the rights to life and to personal integrity (*infra* paras. 244 to 249).

VIII.3 Freedom of Thought and Expression [*fragment deleted*]

230. As to the arguments made by the Inter-American Commission and the representatives regarding the alleged violation of [Article] 13 **[*fragment deleted*]** of the Convention, the Court agrees with the Commission that, in cases such as this one, access to information is vital for effective democratic monitoring of the State's management of the activities of exploration and exploitation of natural resources on the territory of indigenous communities, a matter of evident public interest. **In order for the consultations that are required to uphold the right of the Sarayaku People to communal property and, as will be discussed *infra*, their rights to cultural identity and to political participation, to be adequate, the community has to have access to all relevant information.** Nevertheless, the Court considers that, in this case, the facts have been sufficiently analyzed and the violations conceptualized under the rights to communal property, **[*fragment deleted*] to political participation and to** cultural identity of the Sarayaku People, in the terms of Article**s** 21**, 23 and 26** of the Convention, in relation to Articles 1(1) and 2 thereof; accordingly, it will not rule on the alleged violation of those provisions.

VIII.4 Political Rights

230*bis*. This Court has explained earlier (*supra*) that the State has an obligation to consult indigenous peoples on any legislative or administrative measure that affects their rights. For major projects (*supra*), the State must obtain the free, prior and informed consent of indigenous peoples. The State's duty of consultation safeguards indigenous peoples' right to participate in decisions that affect them, in terms of Article 23 of the American Convention.

230*ter*. The State must adopt all necessary measures to guarantee that indigenous peoples are able to participate through their own institutions, and in accordance with their values, practices, customs and forms of organization in decision-making on all matters affecting them. Such an interpretation of Article 23 of the Convention ensures indigenous peoples' right to decide on their own development path in accordance with their right to self-determination under Common Article 1 ICCPR and ICESCR, Article 3 UNDRIP and Article 7(1) of ILO Convention 169.

230*quater*. There is no doubt that the State failed to consult the Sarayaku People about the award of an oil concession that would directly impact their territories, their cultural identity and their way of life in general (*supra*). Accordingly, the State has violated their right to political participation by failing to consult the Sarayaku on a political decision that affected their rights and by failing to adopt the necessary measures to ensure their effective participation in the decision-making process.

VIII.5 Economic, social and cultural rights [*Moved from earlier in the judgment*]

[*Paragraphs deleted*]

230*quinquies*. Under the principle of non-discrimination established in Article 1(1) of the Convention and in light of Article 26 of the Convention, which protects the rights implicit in the cultural standards of the Organization of American States, the right to cultural identity of indigenous peoples must be protected. Such an interpretation of the provisions of the Convention is mandated by Article 29(b) so as to safeguard the rights of indigenous peoples protected by the Convention, by domestic law, by the Protocol of San Salvador, in particular Articles 3 and 14, and by other sources of international law.

230*sexies*. In this regard, Principle 22 of the Rio Declaration on Environment and Development has recognized that:

> Indigenous people and their communities, as well as other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

230*septies*. Two international instruments are particularly relevant to the recognition of the right to cultural identity of indigenous peoples: [**ILO Convention 169 and UNDRIP**]. Various international instruments of UNESCO also address the right to culture and cultural identity.

230*octies*. For their part, both the African Commission on Human and Peoples' Rights, in cases alleging the violation of Articles 17(2) and 17(3) of the African Charter on Human and Peoples' Rights, and the Committee on Economic, Social and Cultural Rights (CESCR) and, to some extent, the European Court of Human Rights in cases regarding minorities, have referred to the right to cultural identity and the collective dimension of

the cultural life of native, indigenous, tribal and minority peoples and communities. **The Court also observes that in the Endorois case the African Commission has held that there are few, if any, instances in which the right to cultural identity can be legitimately restricted.**[113]

230*novies*. The Court considers that the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society . . .

230*decies*. The right to cultural identity is an essential aspect of indigenous peoples' right to self-determination under Common Article 1 ICCPR and ICESCR and Article 3 UNDRIP, which may not be restricted in interpreting Article 1(1) and 26 of the American Convention.

230*undecies*. In this case, it has not been contested that the company damaged areas of great environmental, cultural and subsistence food value for the Sarayaku . . .

230*duodecies*. The infringements upon the Sarayaku People's right to culture are not limited to territorial intrusions that destroyed sacred places of cultural importance and places for traditional practices, the celebration of rites and other daily activities that form part of their cultural identity. The mere fact that decisions having a major impact upon their life were taken without any form of proper consultation has diverted attention and resources of community members over a prolonged period of time. They were forced to suspend their cultural activities so as to defend themselves. This has had a profound impact on the teaching of cultural traditions and rituals to the children, and on the transmission and perpetuation of the elders' spiritual knowledge.

230*terdecies*. As the African Commission held in the Endorois case, the right to cultural identity imposes a duty upon States not only to tolerate diversity, but also to protect the identity of indigenous peoples and to promote their cultural rights so that different cultures and ways of life can exist and develop in view of the challenges that they face. Through its own actions, including its failure to consult the Sarayaku, and by tolerating the activities

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[113] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) ACHPR 276/2003, para 118.

of CGC, the State not only failed to protect and promote indigenous culture, but has interfered with their cultural practices.

230*quaterdecies*. The Court considers that **[*fragment deleted*] the activities of CGC have directly interfered with the right to cultural identity of the Sarayaku**, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them**, and has distracted the community members from transmitting their culture to their children. Accordingly, the Court finds a violation of the Sarayaku's right to cultural identity, as protected by Articles 1(1) and 26 of the Convention. Furthermore, the oil concession was awarded and executed without any prior nor adequate consultations by either the State or the non-state actor notwithstanding its major impact upon the cultural rights of the Sarayaku People. Therefore, not only their right to cultural identity has been violated, but also their right to choose their own development path in terms of Articles 1(1) and 26 of the Convention, in light of Common Article 1 ICCPR and ICESCR and Article 3 UNDRIP.**

VIII.6 Conclusion

231. On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of the members of indigenous or tribal communities and peoples. However, international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples. In view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective.

232. The State, by failing to **[*fragment deleted*] comply with its obligation to consult with and to obtain the consent** of the Sarayaku People on the execution of a project that would have a direct impact on their territory **and their cultural practices**, failed to comply with its obligations, under the principles of international law and its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People through their own institutions and mechanisms and in accordance with

their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property**, to political participation** and to cultural identity. **In particular, the State decided to grant an oil concession without first consulting the Sarayaku People, notwithstanding their communal ownership rights, their right to political participation, and their right to cultural identity. CGC subsequently launched its operations, again without adequately consulting the Sarayaku and without the State monitoring this process and ensuring accountability.**

232*bis*. Consequently, the Court finds that the State is responsible for **[*fragment deleted*] violating the rights of the Sarayaku People to communal property, to political participation and to cultural identity, recognized in Articles 1(1) and (2), 21, 23 and 26 of the Convention, and has accordingly denied them their right to choose their own development path in terms of the aforementioned rights under the Convention, as interpreted in light of Common Article 1 ICCPR and ICESCR, Article 3 UNDRIP and Article 7(1) of ILO Convention 169. Furthermore, by entering into a Deed of Termination with CGC excluding any possibility to attribute environmental liability to this contractor, the State failed to ensure accountability of this actor for non-compliance with its human rights obligations.**

VIII.8 RIGHTS TO LIFE, TO PERSONAL INTEGRITY AND TO PERSONAL LIBERTY

B. Considerations of the Court

B.1 In relation to the explosives buried on the Sarayaku territory

. . .

246. Since the provisional measures were ordered in this case, in June 2005 . . . the Court has noted with particular concern the placement of over 1400 kilograms of high-powered explosives (pentolite) on the Sarayaku territory, considering that this "constitutes a serious risk factor to the life and integrity of [its] members." Consequently, the Court ordered the State to remove the explosive material, a provision that is still in force to date and with which the State has complied partially . . . **The explosive material was placed in the Sarayaku territory by CGC. However, the State is ultimately responsible for removing this material, either by demanding appropriate action on the part of CGC or by taking the necessary steps itself,**

in which case the costs can be recovered from CGC in accordance with the polluter pays principle.

247. . . . The presence of explosives has caused evident concern to the Sarayaku People owing to the risk to their physical safety, and the activation or detonation of these explosives is, according to the expert witnesses a real and potential possibility.

248. In this case, the oil company, with the State's acquiescence and protection, cleared trails and planted nearly 1400 kilograms of pentolite explosives in Block 23, which includes the Sarayaku territory. Therefore, this has resulted in a clear and proven risk . . .

248*bis*. Moreover, in line with evolving human rights jurisprudence, among others by the Indian Supreme Court, the right to life must be understood as including the right to live in a healthy environment. Consequently, this Court must not only consider the impact of the explosives on the life of the Sarayaku People, but also the impact of the overall exploration activities on the environment in which the Sarayaku live. It has not been contested that the company destroyed caves, and water sources and subterranean rivers that provided the community's drinking water, as well as environmentally valuable trees and plants (*supra* para. 105). Therefore, the Court concludes that the right of the Sarayaku to live in a healthy environment has been infringed upon.

248*ter*. In conformity with its obligation to protect indigenous rights, the State must ensure that CGC, which seriously jeopardized the right to life of the Sarayaku People by planting the explosives in their territory and leaving them there after the exploration activities were finished, is held to account.

249. Based on the foregoing reasons, the State is responsible for having **violated** the right to life**, which includes the right to a healthy environment**, and **for having put at grave risk the right to** physical integrity of the Sarayaku People, recognized in Articles 4(1) and 5(1) of the Convention, in relation to the obligation to guarantee the right to communal property, in the terms of Articles 1(1) and 21 thereof.

. . .

VIII.9 RIGHTS TO A JUDICIAL GUARANTEES [SIC] AND TO JUDICIAL PROTECTION

. . .

B. Considerations of the Court

260. The Court has considered that the State has an obligation to provide effective judicial remedies to persons who claim to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all within the general obligation of States to guarantee the full and free exercise of the rights recognized by the Convention to every person under its jurisdiction (Article 1(1)).

. . .

264*bis*. Finally, the Court highlights the importance of the availability of effective remedies so as to ensure corporate accountability for human rights violations. Access to a remedy is one of the three pillars of the United Nations Framework on Business and Human Rights, as developed by John Ruggie acting as Special Rapporteur.[114] This Court does not have jurisdiction over non-state actors, such as the private oil company that perpetrated some of the human rights violations established in this judgment. Nevertheless, non-state actors do have human rights obligations. In its judgment, the Court has found several instances at which the oil company failed to comply with its obligation to respect indigenous rights. By entering into a Deed of Termination excluding any environmental liability of the contractor, the State shielded CGC from accountability for failing to respect the rights of the Sarayaku People.

. . .

IX REPARATIONS

(Application of Article 63(1) of the American Convention)

. . .

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[114] UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN Doc. A/HRC/17/31 (2011)).

A. Injured Party

284. Under Article 63(1) of the American Convention, the Court considers the injured party to be the Kichwa Indigenous People of Sarayaku, who suffered the violations declared in the chapter on Merits of this Judgment (*supra* paras. 231, 232, 249, 271 and 278), and are therefore considered beneficiaries of the reparations that it orders.

284*bis*. Whereas it is not for this Court to make determinations regarding other communities, populations or persons who are not petitioners in this case (*supra* footnote 21), the Court cannot but note that the Sarayaku People were not the only affected rights holders in the present case. The fact that neighboring communities entered into an agreement with CGC does not imply that their rights (for instance to be consulted by the government) may not have been violated by some of the same events as considered here in relation to the Sarayaku People.

284*ter*. Article 24 of its Rules of Procedure enables the Commission "*motu proprio*, [to] initiate the processing of a petition which, in its view, meets the necessary requirements". In *Blake v. Guatemala*, the Court interpreted this provision (then Article 26(2)) as referring to the possibility not only of filing a new petition, but also of including other victims in an existing application.[115] Since in the present case, the Commission did not use this authority established in Article 24 which enabled it to act *motu proprio* on the basis of any available information, even without an explicit petition by the communities concerned, the Court concludes that it may rule only on the events as they occurred in relation to the Sarayaku People. An integrated approach to rights holders, however, would imply a more case-based approach. This would mean that the Commission would not assess the human rights violations *caused to a certain person or group* (the petitioner(s)), but the human rights violations *caused by certain acts or omissions* from a holistic perspective, thus for a broader range of victims than only the petitioners who submitted the complaint under consideration.

B. Measures of restitution and satisfaction and guarantees of non-repetition

. . .

B.1 Restitution

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[115] *Blake v Guatemala* (1998) IACtHR C 36.

Removal of explosives and reforestation of the affected areas

293. The Court stipulates that the State **[*fragment deleted*] is responsible for the neutralization, deactivation and, as appropriate, complete removal of the surface pentolite**, searching at least 500 meters on each side of the E16 seismic line running through the Sarayaku territory, as proposed by the representatives. **Either the State itself takes the necessary steps thereto, in which case it can recover the costs from the oil company in accordance with its laws, or it orders the oil company to take the necessary steps. The State has to monitor these operations and bears international legal responsibility for any violation of the rights of the Sarayaku People, notwithstanding the accountability of the non-state actor performing the operations in accordance with its domestic law. By all means,** [**the**] ways and means used for this purpose must be chosen after a process of prior, free and informed consultation with the People so that it may authorize the entry and presence on its territory of the equipment and people required in this regard. Lastly, since the State has argued that a risk exists to the physical integrity of the people responsible for removing the explosives, it is for the State, in consultation with the People, to select the methods for removing the explosives that pose the least possible risk to the ecosystems in the area, consistent with the Sarayaku worldview and the safety of the team performing the operation**, even if that team operates under the instruction of CGC**.

294. As for the pentolite buried at a greater depth, the Court notes that, based on the technical appraisals that have been conducted, the representatives themselves have proposed a solution to neutralize its danger . . . the State **[*fragment deleted*] is responsible for**: (i) **[*fragment deleted*] the determination of** the number of points where the pentolite is buried; (ii) **[*fragment deleted*] the burial of** the detonator cables so that they are inaccessible and the explosive can degrade naturally, and (iii) **[*fragment deleted*] the appropriate marking of** the burial locations **[*fragment deleted*]**, even planting local tree species that do not grow roots deep enough to cause an accidental explosion of the pentolite. In addition, the State **[*fragment deleted*] is responsible for adopting** the necessary measures to remove any machinery, structures and non-biodegradable waste that have remained as a result of the oil company's activities, and reforest the areas that may still be affected by the opening up of trails and campsites for the seismic survey. These tasks must be carried out following a process of prior, free and informed consultation with the Sarayaku People, who must authorize the entry and presence on its territory of the material and persons required to this end.

295. **[*fragment deleted*] The State is responsible for the implementation of** this measure of reparation **[*fragment deleted*]** within no more than three years. For the purposes of compliance, the Court decides that, within six months, the State and the Sarayaku People must establish by mutual agreement a schedule and a work plan that includes, among other aspects, the determination of the location of the superficial pentolite and of the material buried at a greater depth, as well as the specific and effective steps to deactivate, neutralize and, as appropriate, remove the pentolite. Within the same period, the parties must provide the Court with information in this regard. Once this information has been submitted, the State and the Sarayaku People must report on the measures taken to comply with the work plan every six months.

B.2 Guarantees of non-repetition

a) Due prior consultation

. . .

299. While it is not incumbent on the Court to rule on new oil bidding rounds that the State may have initiated, in the present case, the Court has determined that the State **[*fragment deleted*] has violated the rights** to communal property**, to political participation and to cultural identity** of the Sarayaku People, **because it did not consult them and did not obtain their free, prior and informed consent, and because it did not regulate or monitor the negotiations between CGC and the Sarayaku People. The non-state actor has not complied either with its duty to consult and to conclude an agreement with the Sarayaku People in order to respect their rights.** Consequently, as a guarantee of non-repetition, the Court stipulates that, in the event that the State should seek to carry out activities or projects for the exploration or extraction of natural resources, or any type of investment or development plans that could eventually have an impact on the Sarayaku territory or affect essential aspects of their worldview or their life and cultural identity, the Sarayaku People shall be previously, adequately and effectively consulted **by both the State and by the non-state actor that executes the project**, in full compliance with the relevant international standards. **The free, prior and informed consent of the Sarayaku People is required for projects that may have a major impact on their rights. The State bears the responsibility for ensuring that non-state actors are accountable for their human rights obligations.**

300. In this regard, the Court recalls that the processes of participation and prior consultation must be conducted in good faith at all the

preparation and planning stages of any project of this nature. Moreover, in keeping with the international standards applicable in such cases, the State must truly ensure that any plan or project that involves, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, prepared by independent, technically qualified entities, with the active participation of the indigenous communities concerned.

b) Regulation of prior consultation in domestic law

. . .

c) Training of State officials on the rights of indigenous peoples

302. In this case, the Court has determined that the violations of the rights to **political participation and to** prior consultation**, in relation with the Sarayaku People's rights to communal property and to cultural identity, [*fragment deleted*]** resulted from the acts and omissions of different officials and institutions **as well as of non-state actors,** that failed to guarantee those rights. The State must implement, within a reasonable time and with the corresponding budgetary allocation, mandatory programs or courses that include modules on the domestic and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as others whose functions involve relations with indigenous peoples, as part of the general and continuing training of officials in the respective institutions, at all hierarchical levels. **In conformity with their obligation to protect indigenous rights, the State should encourage non-state actors that execute projects affecting indigenous rights to participate in these trainings.**

. . .

C. Compensation for pecuniary and non-pecuniary damage

. . .

C.2 Non-pecuniary damage

. . .

b) Considerations of the Court

322. When declaring the violations of the rights to communal property and consultation, the Court took into account the serious impacts suffered by the People owing to their profound social and spiritual relationship with their territory and, in particular, the destruction of part of the forest and certain places of great symbolic value.

323. Bearing in mind the compensation ordered by the Court in other cases, and based on the circumstances of this case, the suffering caused to the People and to their cultural identity, the impact on their territory, particularly due to the presence of explosives, as well as the changes caused in their living conditions and way of life and the other non-pecuniary damage they suffered owing to the violations declared in this Judgment, the Court finds it pertinent to establish, in equity, the sum of US$1,250,000.00 (one million, two hundred and fifty thousand United States dollars) for the Sarayaku People as compensation for non-pecuniary damage. This amount must be paid to the Association of Sarayaku People (*Tayjasaruta*), within one year of notification of this Judgment, so that the money may be invested as the People see fit, in accordance with its own decision-making mechanisms and institutions, among other aspects, for the implementation of educational, cultural, food security, health care and eco-tourism development projects or other community infrastructure projects or projects of collective interest that the People considers a priority, **paying specific attention to the rights and needs of children and young people**.

. . .

X OPERATIVE PARAGRAPHS

341. Therefore,

THE COURT DECLARES:

Unanimously, that:

1. Based on the broad acknowledgment of responsibility made by the State, which the Court has assessed positively, the preliminary objection filed has no purpose and it is not appropriate to analyze it, in the terms of paragraph 30 of this Judgment.

2. The State is responsible for the violation of the rights to consultation, to indigenous communal property, **[*fragment deleted*] to political participation**

and to cultural identity, in the terms of Articles 21**, 23 and 26** of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the Kichwa Indigenous People of Sarayaku **and, accordingly, their right to choose their own development path** . . .

3. The State is responsible for **the violation of** the right to life, **which includes the right to a healthy environment,** and **for severely jeopardizing the right** to personal integrity, recognized in Articles 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, in the terms of Articles 1(1) and 21 thereof, to the detriment of the members of the Kichwa Indigenous People of Sarayaku . . .

4. The State is responsible for the violation of the right to judicial guarantees and to judicial protection recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa Indigenous People of Sarayaku . . .

5. It is not appropriate to analyze the facts of this case in light of [**Articles 7, 13 and 22**] of the American Convention, or of Article 6 of the Inter-American Convention to Prevent and Punish Torture . . .

AND ORDERS:

Unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must **ensure that [*fragment deleted*]** all pentolite left on the surface and buried in the territory of the Sarayaku People **is neutralized, deactivated and, if applicable, removed**, based on a consultation process with the People . . . **The State must also ensure that the environmental degradation is fully restored.**

3. The State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any **[*fragment deleted*]** plan of any other type that could involve a potential impact on their territory . . . **The State must obtain the free, prior and informed consent of the Sarayaku People for any project that may have a major impact on their rights.**

4. The State must ensure that the non-state actor that executes a project affecting the rights of the Sarayaku People consults with them, and obtains their agreement for projects that may have a major impact on their rights.

[**5**]. The State must adopt [**the** necessary] legislative, administrative or any other type of measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples and communities **and, accordingly, their right to choose their own development path,** and to amend those that prevent its free and full exercise and, to this end, must ensure the participation of the communities themselves . . . **Such measures must ensure that no project or activity can be executed or continued without the necessary consultations having been conducted by both the State and the non-state actors involved. Where applicable, the free, prior and informed consent of indigenous communities must be obtained. These measures must provide for accountability of the non-state actor in case of non-compliance with its human rights obligations.**

[**6**]. The State must implement . . . mandatory training programs or courses that include modules on the national and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as other officials whose functions involve relations with indigenous peoples . . . **The State must encourage non-state actors to participate in such training programs or courses.**

. . .